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THE LEGAL COMMUNITY OF MANKIND

THE LEGAL
COMMUNITY
OF MANKIND

A CRITICAL ANALYSIS OF THE MODERN
CONCEPT OF WORLD ORGANIZATION

By WALTER SCHIFFER

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PREFACE

IF THE WORLD SURVIVES—an ominous “if”—it cannot go on as a congeries of wholly independent watertight political communities. On that most responsible minds are agreed. There is, however, no agreement on the form which any sort of feasible world organization will take. And it is clear that the least intelligent way of dealing with the question is to consider it as though it were a wholly new one and as though our thinking could make what is called a “fresh start,” without examining the accumulated tradition that has conditioned and in a sense created our method of approaching the problems with which we are faced today.

Dr. Schiffer, whose untimely death has left an appreciable gap in the ranks of those whose training and capacity can illumine this particular problem, has presented in this book a careful and critical examination of the historic bases of the concept of world organization. Little as “practical” lawyers and statesmen relish the fact, these historic bases are to be found first of all in books, old books, the books of Grotius, Pufendorf, and Christian Wolff. But it is not because these men were eminent thinkers that Dr. Schiffer devotes the first part of his study to them but because the concepts and even the words they used are firmly imbedded in all later discussion of the subject, and the sharp analysis here contained enables us to understand them better.

This is, however, only the first part of the book. A much more important part is to be found in the detailed examination of the concepts which recur again and again when the need of some world organization is made manifest. What are to be its foundations? Can a universal law be established? Can we count on a community of human interests? Is there any solidity underlying such notions as natural law? Can we assume that there is a definite

progress in society toward a larger altruism? Dr. Schiffer traces the growth of these ideas, the opposition they have encountered, the compatibility or incompatibility with each other which has been found in their various expressions, against the background of nationalism in politics and positivism in philosophy, and he finally examines with patient and impartial scrutiny the attempt made to realize the hope of a world polity in the League of Nations.

The task as he sees it is not that of readjusting a present situation in such a way as to cure a patent evil. It is that of making an idea, or rather a complex of ideas, intelligible and of deciding whether anything feasible or desirable can result from them. For this purpose, no better summation can be found than this book. It will be an indispensable aid in appraising our present hope of attaining the goal frustrated when the League of Nations collapsed. It is neither an optimistic view of our chances of success nor a prognostication of inevitable failure. We cannot judge of these matters without being informed, and it is precisely that result, an informed judgment, which will be rendered easier by this book.

February 13, 1950

MAX RADIN

FOREWORD

THE ORIGINAL IDEA of analyzing the conflicting theoretical concepts underlying the creation and activities of international organizations such as the League of Nations and the United Nations dates back to the time in Geneva, Switzerland, when Walter Schiffer was at work on his first systematic analysis of contemporary doctrines of international law. This earlier work appeared in 1937 under the title, *Die Lehre vom Primat des Völkerrechts in der neueren Literatur*. While the plan for the present study remained uppermost in my husband's mind, most of his time had to be devoted to other matters. During the years prior to his coming to the United States in 1941, he prepared his monograph dealing with the genesis of Article 16 of the Covenant of the League of Nations and participated in various other research activities of the Geneva Research Center, which led to his *Répertoire of Questions of General International Law before the League of Nations* (1942). During his association with the Maxwell School of Citizenship and Public Affairs at Syracuse University in 1944-45, he completed his comprehensive "Study of the Structure of the League of Nations," which has, as yet, not been published.

A Guggenheim award in 1944 enabled Walter Schiffer to begin work on the present study, which carried to fruition the idea of a systematic analysis of concepts and doctrines of international organization and which as such may be regarded as a completion and sum of his life's work. My husband died in 1949 after finishing the manuscript but before any arrangements could be made for its publication. The manuscript has undergone only minor editorial changes in the course of preparing it for publication.

Without the generous support of the John Simon Guggenheim Memorial Foundation and of the Institute for Advanced Study in

Princeton, of which Walter Schiffer was a member from 1943 to 1948, this study could neither have been undertaken nor completed. My husband benefited greatly from the sympathetic understanding of the late Professor Robert B. Warren of the Institute for Advanced Study. Both Professor Walter W. Stewart of the Institute and Dr. Henry Allen Moe of the Guggenheim Foundation lent their support and advice in connection with the arrangements for the publication of the book by Columbia University Press. Professor K. William Kapp of Brooklyn College, who had known my husband since their studies in Geneva, assumed full responsibility for seeing the manuscript through the various stages of preparation for publication and much is owed to him for his help.

Mrs. Ruth Cherniss translated extensive quotations from the original French and Latin texts which were included in the manuscript; Miss Beatrice Miers checked all bibliographical references and unified footnotes, and Miss Elisabeth Horton aided greatly in connection with practically every phase of the completion and final publication of the book. To them and to all the friends who contributed toward the final publication of the book I express my sincere thanks.

Princeton, N. J.
March, 1954

HELENE SCHIFFER

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THE LEGAL COMMUNITY OF MANKIND

INTRODUCTION

THE PURPOSE of the present study is to analyze the concept which has made a scheme of international organization along the lines of the League of Nations or United Nations, generally appear as a plausible and normal solution of the problem of universal peace. Such an analysis seems to be an indispensable condition of clarifying current thinking on the question of international organization.

The world organization now in existence—the United Nations—is based on the idea that universal law and order can be preserved through an association of independent states. “To save succeeding generations from the scourge of war,” the United Nations have undertaken “to unite [their] strength to maintain international peace and security.”¹ Peace and security cannot be maintained, however, by force alone; satisfactory economic and social conditions seem to be required if the peoples of the world are to live together peacefully. Accordingly, this organization is also designed “to promote social progress and better standards of life.”² Thus the United Nations organization has been given tasks similar to those which normally are performed by the various national states in their respective spheres of authority. For in the national community the state is concerned with the maintenance of peace among the citizens and the promotion of their welfare.

A state cannot exist without a legal order; it is a legal community. When the United Nations Charter was adopted, it was presumed that the whole world was governed by a global law and that, therefore, mankind constituted a global legal community. But in the past the law of this community had not been effective. Mankind had been divided by political struggles between states, and these struggles and the wars in which they culminated, rather than respect for law and order, had characterized the global

community. The United Nations organization is intended to modify that situation and to replace in the global community the rule of force by the rule of law. It has the purpose of establishing "conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." ³

The conditions expected to form the basis of universal peace and order are not, however, the same as those which exist within a state. In the United Nations organization the purpose of insuring "that armed force shall not be used, save in the common interest," is to be achieved "by the acceptance of principles and the institution of methods," and "international machinery" is to be employed "for the promotion of the economic and social advancement of all peoples." ⁴ These methods, as well as this machinery, are international. The organization is not a world state but an association of states, and it is through the collaboration of states that the organization is to fulfill its tasks.

From the point of view of the Charter the world appears as a unit, held together by common interests and governed by a universal law. Among the principles which the member states have accepted, the Preamble mentions one which strongly expresses the bond uniting all members of the human race regardless of their nationality. This is the principle of fundamental human rights which has its basis in the dignity and worth of the human person. But the members of the human race live together in various political units, and these units, organized as states, can alone be members of the United Nations. The Charter constitutes an attempt to organize the community of mankind through an association of independent states. The Charter states that "the Organization is based on the principle of the sovereign equality of all its Members." ⁵ Whatever the correct meaning of the term "sovereignty" may be, it at any rate denotes a degree of independence which is not enjoyed by any group within a state. Although the United Nations organization is intended to perform, with regard to the world, tasks similar to those fulfilled in the national community by the state, it itself, therefore, is not a state

and its methods and its machinery are different from those used within a state.

During the last few years doubts as to the feasibility of such a scheme have been expressed by a steadily growing number of supporters of the idea of world organization, and the alternative creation of a world state has been proposed as the only workable method of eliminating war. It may seem surprising that the advocates of world government find it necessary to prove the impracticability of the United Nations scheme. It may appear to be self-evident that the world can become a legal community in the same sense as a state only if it is organized like a state, and particularly that the independence of supposedly subordinate groups is an obstacle to the complete legal unity of the world. Actually, however, the opinion that the United Nations Charter adopted the natural method of organizing the world was held by most friends of international organization at the time when the Charter entered into force.

The United Nations organization constitutes the second attempt to prevent war through an association of states. The League of Nations had been based on a concept similar to that underlying the United Nations, and the Charter, while it was intended to establish a "more perfect" organization than the League had been, followed the general pattern set by the Covenant. Although the League had come into existence without precedent in history, its creation had been theoretically well prepared. It appeared as the realization of ideas which had developed during a long period. These ideas concerned the nature of legal relationships between states and had finally led to a definite concept of international organization. In the light of this concept the world seemed to need organization, but a world state appeared neither as a necessary nor even as a desirable means of establishing and maintaining universal peace and order. The goal of human development seemed to be the gradual transformation of the world into a perfect legal community where problems which formerly had been political could find a legal solution. But it was regarded as possible to achieve this transformation without fundamentally altering the

political structure of the world, which had given rise to political problems and struggles. The world was to be organized, but it was to remain divided into independent states. The legal order of the universal community which was not to be a state was expected to have similar effects as if that community had been a state.

This concept of world organization, its growth and its application in the Covenant of the League of Nations is the object of the present study. The examination of this concept seems to disclose internal inconsistency which makes schemes of world organization, based on such a concept, appear impracticable. Insofar as the impracticability of an organization along the lines of the League of Nations and United Nations is concerned, the conclusion arrived at by this analysis therefore is in agreement with the opinion of those who reject the United Nations idea and suggest the creation of a world state. However, to avoid any possible mistake, it may be said in advance that the analysis made in this study does not lead to any conclusion with regard to the question as to whether or how a world state should be established at the present time. To this question, which is political in character, this theoretical study can offer no answer. It should also be made clear that it is not suggested that the failure of the peoples of the world to unite in a world state now or at an earlier time is due to any idea that world government is unnecessary and undesirable. It is not intended to explain the absence of a world state. The only object of this study is to analyze an historical pattern of thought which expected that an organization, which was not a world state, would initiate an era of universal peace, security, and order. The League of Nations and the United Nations were created for this purpose.

The statement of purposes contained in the treaties establishing the League and the United Nations, of course, did not necessarily express the real intentions of all the states which became members of these organizations. From the point of view of a particular state the international organization could be regarded as a means of furthering that state's own political interests rather than as an instrument of universal peace and welfare. Observers

of international affairs who regard themselves as hard realists may even assert that the lofty ideas expressed in the Covenant and the Charter were used deliberately by the statesmen to conceal their real political intentions. Even if this assertion were true, the present analysis would still be necessary. An attempt to deceive the world in this manner could be made only if there existed a pattern of ideas so familiar and persuasive to large parts of the world's population that a certain plan of world organization appeared to them to be reasonable and acceptable if it seemed to fit into that pattern. The principles of international collaboration laid down in the Covenant of the League and in the Charter of the United Nations require an explanation irrespective of the particular motives which determined each individual government to adhere to these principles.

The concept which made an organization of the League of Nations type appear as a guarantee of general peace and security has, in fact, become so widely accepted that to a considerable extent it has shaped the thinking of statesmen as well as of the public regarding the necessity and possibility of organizing the world and the principles of world organization. As a set of popular ideas, that concept has not, of course, the character of a scientific doctrine. It reflects, however, theories worked out by scholars, and only through reference to these theories is it possible to understand those ideas. The analysis here to be made, therefore, is concerned with a theoretical concept and with the theories that have contributed to its formation.

That concept has not been expressed in its entirety by any individual writer or group of writers in such a manner that one could identify it simply by referring to a limited number of books. Its elements appear in the writings of many scholars whose theories differ from one another in various ways. But these elements constitute a definite concept, a general pattern of common thought. Its identity reveals itself not only in the characteristic combination of certain historically developed ideas, but above all in the fact that the theories following that pattern rest on the same basic assumptions from which certain conclusions result inevitably. It is true that the scholars themselves are not

always fully aware of either the historical background or the necessary premises and implications of their own theories. This phenomenon, in fact, particularly seems to justify the attempt to clarify the theoretical basis of world-organization schemes along the lines of the League of Nations and United Nations.

The basic elements of the concept are to be found in the doctrine of natural law and in the idea of progress. It is easy to understand why the doctrine of natural law was bound to be of decisive importance for the growth of the idea that the world, divided into independent states, was a legal community governed by a global law. Ordinarily, legal rules are created, interpreted, and enforced within a state. The fact that these rules are created by human acts gives them the character of positive law; their existence and binding force depend upon the state organization. Through this organization the legal rules of a state appear as combined in a legal system. As long as the world is divided into independent states, there can be no universal statelike organization. But the idea that, in spite of the absence of such an organization, a global law governs the world can arise if it is assumed that besides positive law there exists another, higher, type of law which is of universal validity and independent of any connection with a state. Such a law is the law of nature. It is supposed to derive directly from the nature of man, to exist and to have binding force without being laid down in statutes, court decisions, or other acts, and to be self-evident to all beings endowed with reason. The natural-law doctrine influenced even those theories which were intended to prove that there existed a global law as positive as the law of the states. This fact is of particular importance with regard to the concept which is the object of the present study, because a global organization of the League of Nations type was expected to create conditions that made a universal, positive, legal order possible, although the organization had not the character of a state.

Rules expressing the dictates of nature are supposed to indicate how the individual interests of every member of a community can be reconciled with the interests of all the other members and with those of the community as a whole. From the point of view

of a doctrine which assumes the existence of such rules, the harmony of interests—the goal of an orderly and peaceful community—appears as naturally given and ascertainable by reason. The observance of the natural rules seems to guarantee the maintenance of that harmony; their observance seems to depend on the extent to which the human beings endowed with reason actually make use of this capacity. The idea of progress, fully developed during the nineteenth century, gave rise to the belief that the peoples of the world, steadily advancing toward greater reasonableness and toward material and moral perfection, have gradually acquired a better knowledge of their natural interests and have become more and more willing to act in accordance with this knowledge. This belief led to the assumption that mankind was moving toward unity, a unity established by the community of reasonable interests rather than by the existence of a world government.

The influence of these ideas on the growth of the League of Nations concept is, of course, well known. The adherents of that concept generally regarded themselves as progressives. It is also well known that the doctrine of natural law has strongly influenced the science of international law. But it remains to be shown in detail in what manner the doctrine of natural law and the idea of progress have contributed to the growth of the concept which made an organization like the League of Nations appear as the natural solution of the problem of universal peace. Only a detailed examination of its theoretical background will lead to a complete understanding of that concept.

The concept has developed in the course of history, and it has seemed appropriate to describe its growth historically. The starting point was chosen with reference to the origin of the science of international law, because the earliest representatives of this science first developed the idea that the world, divided into independent states, was a legal community. The modern science of international law arose when the medieval unity of Western Christendom disintegrated and the consolidated territorial states appeared as predominant factors in the political sphere. Some knowledge of the particular kind of unity which had existed in

the late Middle Ages is indispensable for an understanding of the origin of the theory of international law. Medieval unity, therefore, is the first phenomenon to be analyzed. The final outcome of the historical development of ideas was the concept of international organization, which found its expression in the Covenant of the League of Nations. To reveal the contents and character of that concept, a detailed examination of the general principles of the League system of collective security and international collaboration is necessary. The League, it is true, has ceased to exist and the United Nations organization has been created in order to fulfill, through similar though not identical methods, the tasks which the League had been expected to perform. An analysis of the United Nations Charter might, therefore, have seemed more timely. But the League of Nations was the direct result of the theoretical development here described, whereas the United Nations Charter simply adopted the general pattern of the League system, which it tried to improve in some respects.⁶ A thorough explanation of the League of Nations idea is, therefore, indispensable for understanding the United Nations concept, and this concept can be understood without detailed explanation once the League of Nations idea has been clarified.

The description of the growth during a certain period of a particular theoretical concept requires the separation of the ideas which contributed to that concept's formation from the broad stream of historical development. Therefore, other trends of thought simultaneously developed concerning the problem of war and peace are not mentioned, however important and interesting they may be. No attempt has been made to analyze in detail the relationship between the ideas which constitute the object of this study and the political and social conditions out of which they grew. Nor was it intended to trace each idea back to its ultimate philosophical basis or to show its place within the general framework of contemporary thought. The following analysis is concerned, however, with the growth of a theoretical concept, not with isolated ideas. It is only through the systematic connection created by a theory that the ideas by which each phase of the historical development of the League of Nations

concept is characterized acquire their specific meaning. For this reason it seemed appropriate to select as the representative of each of certain important phases one particular writer in whose theory that combination of ideas is achieved in a typical manner. Selection necessarily implies incompleteness. The names of numerous authors who have become well known in connection with the problems dealt with here, therefore, are not found in this study. The theories discussed are those which seem to indicate most clearly important links in the chain of thought connecting certain ideas developed at the end of the Middle Ages with the concept underlying the attempts to organize the community of mankind through an association of independent states.

PART ONE

THE CONCEPT OF NATURAL LAW AND
THE GROWTH OF THE SCIENCE OF
INTERNATIONAL LAW

I

THE UNITY OF WESTERN CHRISTENDOM IN THE LATE MIDDLE AGES AND ITS DISAPPEARANCE

THE SCIENCE OF INTERNATIONAL LAW in the modern sense of the term arose when the unity of Western Christendom had disappeared. The purpose of that science was to prove that, after the breakup of this unity, there still existed a legal bond uniting various peoples. The particular character of medieval unity decisively influenced the growth of the theory of international law. The characteristic feature of that unity as it existed in the late Middle Ages was the authority which the Popes exercised over Western Christendom.

A description of the position of the papacy during this period is difficult because of the complexity of medieval history and thought; because of the changes, within the period, in political circumstances and ideas; and because of the impossibility of always distinguishing clearly between actual conditions and theories elaborated for the advancement of the claims of one or another of the forces struggling for power. It is possible, however, to extract from the confusing wealth of facts and ideas some general elements which characterize the situation insofar as it is important to the question under consideration.

The first outstanding element was the existence of a religious bond uniting the Western Christian world, and, corresponding to this unity, of an ecclesiastical organization of which the Pope was recognized as the head. The Christian world had been united before in the Christian Roman Empire which had existed since the conversion of Constantine. When this Empire had vanished, the idea of the unity of the Christian world was preserved by

the Church. The creation of a new Empire by Charlemagne and Otto I could be regarded as the continuation, in the West, of the old unity which had been expressed by a theoretically universal faith and a corresponding political organization; and this idea of continuity was supported by the revival of Roman law, which took place in the late Middle Ages. The Empire of Otto and his successors, however, never actually included all those peoples which adhered to the Western Church. It was, therefore, the Church rather than the Empire which in fact represented the unity of the Western world,¹ and it was the disappearance of the unity of the Church which gave rise to the political conditions and theoretical concepts out of which modern international law arose.

The authority of the ecclesiastical organization was in principle limited to spiritual matters. Within the Western Christian world there were two types of organization, the spiritual and the temporal. Their spheres of authority were in principle defined by their respective characters. But in theory as well as in practice the delimitation of the spheres proved difficult and gave rise to controversies. As a result of an extensive interpretation of spiritual authority, the Popes, who had emerged as the heads of the Western Church, claimed during the late Middle Ages power to exercise influence in political affairs throughout Western Christendom. During approximately two centuries (from the end of the eleventh to the beginning of the fourteenth) they actually exercised enough power in this domain to substantiate to some extent their own and their supporters' claims and to give these claims a real basis to which reference could be made even after changing conditions had led to a definite weakening of the Pope's position. But however their power was conceived of by the Popes themselves and by those who supported their cause—whether as *plenitudo potestatis*, extending to the temporal as well as to the spiritual sphere, or as an indirect power with respect to political questions which were primarily within the jurisdiction of the temporal rulers—in any case their authority was claimed and exercised on the basis of the exalted character of their office as spiritual heads of Christendom.

The Pope's power was exercised in a particular way. The Church, with the papacy at its head at the time when the papal claims came nearest to realization, has been described as an "international state."² If used in a certain sense this paradoxical term may be useful in explaining the characteristic features of the system.

It was possible to speak of a state in this connection because certain elements tended to make Western Christendom under the Popes appear as a political and legal unit. It has been said that by the time of Innocent III the Church "had everything that a state has—and more."³ In this statement the term "state" is obviously used in the sense of the modern state. The Church had in fact a centralized organization and a universal legal order—canon law—which was applied by ecclesiastical courts. This law was, although in different degree, binding on all members of the Church, laymen as well as clergy. While it was concerned only with spiritual matters, canon law included subjects which under modern conditions are regulated by state law. Tasks which now are performed by the state, such as those concerning education and care for destitute people, were undertaken by the Church. But the spiritual power could and did interfere even in matters regarding the exercise of temporal authority in the latter's specific sphere of activity, as it was then recognized. This interference occurred when the temporal authority was used in a manner appearing reprehensible from a religious point of view. To a certain extent the Church claimed the right to intervene for the defense of those unjustly treated by secular authorities.⁴ It also could make its influence felt in the temporal domain with regard to constitutional questions and could even effect the deposition of secular rulers. This last kind of interference could generally be based on the idea that the holders of temporal offices were, as members of the Church, subject to its discipline and that, in case of infraction of religious rules, action could be taken against them which resulted in the loss of their position.⁵ The Church had at its disposal special means of enforcing its rules. Excommunication and interdict were the principal means of compulsion which, although spiritual in character, were

capable of producing far-reaching effects in the temporal sphere. But there was still another method of coercion used by the Popes which tended to demonstrate the political unity of the Christian world: this was the holy war proclaimed by the Pope—the crusade. It could be directed not only against those living outside the world of Christianity, but also against disturbers of the peace within, especially heretics.⁶

Thus Western Christendom could in a certain sense be described as a state; it was, however, a state of a particular nature, an “international” state. The rulership of the Popes, as far as it was realized at all, was never exercised in the way of direct administration in the temporal sphere. Even those who claimed for the Pope the highest temporal as well as spiritual power obviously did not think of replacing throughout the Christian world temporal with ecclesiastical rule. Medieval society did not tend toward a theocracy in the strict sense of the term.⁷ Except for parts of Italy, immediate administration was left in principle to the temporal authorities so far as nonspiritual matters were concerned. This means that the temporal and spiritual spheres were considered as separate and as established for different purposes and that, while they could come into conflict with one another, no complete merger of the two spheres was contemplated or at any rate effected. The ecclesiastical power’s interference in specifically temporal affairs did not occur in the form of a continuous government procedure but rather in that of an intermittent intervention, exercised whenever the interests of the community of Christians seemed to require it. In the period here under consideration this community had no unified temporal authority. The Empire was in fact, if not always in theory, only one among several temporal rulerships of equal status as far as independence of any higher temporal authority was concerned. The plurality of temporal rulers within the Christian world united in the Church gave the Christian community a character which could be described as “universal federalism.”⁸ “The Papal *Respublica Christiana* was based on a combination of ecclesiastical centralism and uniformity with political diversity and devolution.”⁹ This structure of the Western Christian world, combined with

the fact that the bond uniting its parts had not the nature of a continuously functioning government in the temporal sphere, resulted in conditions comparable to international relations in the modern sense. Political units established contacts with one another by contractual agreements and settled their disputes by means of war. The difference between international relations in the strict sense of the term and those conditions in the late Middle Ages lay in the fact that there existed in the papacy a central organ that derived its authority from a source independent of the political bodies that formed part of the universal community. The Popes fulfilled certain functions with regard to the "international" problems. They confirmed agreements between secular rulers and reserved for themselves the right to subject to ecclesiastical censure a party violating them.¹⁰ They could generally intervene in political conflicts between temporal rulers in the interest of peace.¹¹ In the matter of war the papacy was an authority capable of giving a judgment as to the justness of the cause leading to an armed conflict.¹²

It should now be clear in what sense the spiritual rulership of the late Middle Ages can be designated as an international state. One particular feature of this system, however, which was of great importance for the development of the modern idea of an international legal community, remains to be emphasized. The international state of the Middle Ages was characterized by the dualism of spiritual and temporal power and by the political influence of the former on the latter. As a result of this influence there existed actually a hierarchy of powers. But it must be kept in mind that the authority of the Church over the temporal rulers was not only higher in the sense in which a superior state organ is higher than an inferior one or the state is higher than a province. The Pope's authority was different in kind from that exercised by temporal rulers: there was a qualitative difference between temporal and ecclesiastical rulership. The latter had its root in the spiritual sphere, and the superiority of this sphere over the temporal was the basis of the papal claims with regard to interference in the political affairs of Christendom.¹³ Although it had political consequences, this interference was, in theory at least,

not based on political but on religious and ethical considerations. Such questions as those of sin, of the sanctity of an oath,¹⁴ of justice and peace within Christendom were supposed to be the problems with which the Church as such was concerned.

If the spiritual sphere was considered higher in kind than the temporal, it must be noted, however, that both spheres had a legal character. The spiritual domain in particular was not only a religious but also a juridical sphere. Thus the relationships between the two powers were conceived of in legal terms, and in the struggles between them legal arguments were used by which it was attempted to define the limits of two different spheres of jurisdiction.¹⁵ Western Christendom as united under the Popes' rulership in the "international state" of the late Middle Ages was a legal unit, the spiritual sphere embracing the spheres of temporal rulership which were governed by positive law. The legal order of the spiritual sphere was related to the idea that there existed a world order instituted by God, which was superior to positive rules laid down by man. The concept of a law superior to positive rules had been developed in antiquity. This higher law was the law of nature that, in the form in which it exercised an influence on the thought of subsequent periods, was conceived of as derived from the nature of man as a reasonable being and representing the principles of reason and justice.¹⁶ In the Middle Ages this concept was incorporated in the general Christian concept of a divine world order. The canonists identified natural with divine law.¹⁷ There were also theories which in various ways distinguished between the law of God and the law of nature. But it is not necessary here to examine these theories. It is possible to state that generally the idea of natural law was connected with the concept of the spiritual sphere—that is, the sphere which was regarded as the domain of the Church. Thus Pope Gregory IX (1227–1241), in one of his decretal letters, laid down the principle that any transgression of natural law endangers a man's salvation.¹⁸ As a sin, such a transgression then came into the jurisdiction of the Church. It would not be correct to assume that canon law, the law of the Church, was as a whole identified with the law of God or with natural

law; parts of it were regarded as positive rules.¹⁹ But *jus divinum* "suffused" the entire body of canon law,²⁰ and natural law, as part of the living world order, as embodiment of eternal justice, was on the highest level in the legal system of the Christian community. It was supposed to be one of the primary tasks of the spiritual power to ensure the observance of this law. The secular power was considered bound by the law of justice, and it was assumed that its authority could be regarded as legitimate only insofar as its exercise conformed to the higher rules. In this sense it could rightly be said that the foundation of the regime under consideration was the natural law²¹ and that the temporal power was subject to natural law, which was interpreted by the Roman Pontiff.²²

The importance of the idea that there existed a higher legal sphere above the temporal domain can be understood only if it is considered in connection with the international character of the Christian community in the sense indicated above. The international structure of that community prevented it from becoming a theocracy in the ordinary sense of the term. In an ordinary theocracy—that is, a government by priests in a unified state—laws may be regarded as dictated by something higher than human will. But the whole body of rules governing the life of the community then becomes law in a higher sense; in this respect the whole legal sphere is on the same level. In the papal system of the late Middle Ages the international structure of the Christian Community, characterized by the existence of various secular rulerships and, above them, a legal order of a different nature and of only intermittent application to temporal affairs seemed to make it possible to distinguish, within the legal domain, between a higher, spiritual, and a lower, temporal, level. The higher sphere, imbued with morality, religion, and justice could, in theory at least, be delimited with regard to the lower sphere of temporal rulerships. Because of the international structure of the Christian world, the spiritual sphere provided the only general bond uniting all the temporal rulers who did not obey any common temporal superior, and the standards of that sphere became the general rules regulating the relationships between these rulers.

Insofar as the idea of a legal higher sphere was connected with the international character of the papal system and as this character implied the absence of a strong, continuously working central government over the Christian world as a whole, there existed a direct correlation between the organizational weakness inherent in that character of the universal system and the higher quality of the spiritual authority. If the papal regime had constituted a real central government, the rule of the Popes would have become indistinguishable from temporal authority. This problem found expression in some propapal writings of the first half of the fourteenth century in which the authors attributed to the Popes the highest authority in temporal as well as in spiritual matters and tried to explain why their authority was not directly exercised except in some parts of Italy. These authors ascribed the absence of direct government not to the existing political conditions but to a decision made by the Popes not to vitiate the spiritual character of the higher sphere by governing in the manner of temporal rulers.²³

A similar kind of argumentation could be used by antipapal writers to oppose any ecclesiastical interference in temporal affairs, and its actual use prepared the way for the development which eventually culminated in the breakup of the medieval system. The principal elements of this development are known too well to require a detailed analysis; they were the Reformation, which destroyed the unity of the Church, and the consolidation of the territorial states. But it is necessary to mention the theoretical considerations which arose in connection with the transition from medieval to modern conditions and which to some extent determined the specific manner in which the breakup of the medieval system influenced the thinking of subsequent periods of international problems.

The fundamental problem of that system was that of defining the respective spheres of the spiritual and the secular authority. If papalist writers explained the absence of a direct theocratic government embracing the whole Christian world by referring to the special nature of the spiritual authority which would have been debased by the immediate exercise of temporal power,

adversaries of the papacy could, by following the same line of argumentation, oppose any ecclesiastical interference in political affairs without denying the existence of a sphere of higher rules above the temporal domain. In fact, the "international state" of the Middle Ages was based on two contradictory principles. The unity of this state was established by the existence of the common Church, which was supposed to exercise an authority higher in kind than that of the temporal rulers. Impartial justice and Christian love, which were supposed to be the guiding principles of the spiritual sphere, seemed to require the absence of power and politics in the exercise of the spiritual authority. The latter's exalted character appeared to be the better preserved the higher it rose above the sphere where those considerations were of importance and the more it limited itself to applying its means of coercion only in the interest of man's salvation. But if the spiritual authority were to exercise any influence in the lower sphere of temporal rule, if the attempt to maintain peace and order in the Christian world were to have any effect, then the Church necessarily had to participate in the political struggle and to use its means of compulsion in a manner which produced results in the political sphere. The spiritual authority thus became inevitably entangled in secular affairs. This entanglement tended to eliminate the distinction between the higher and the lower, the spiritual and the temporal, spheres, and particularly to deprive the spiritual power of its character of impartial guardian of justice. The secularization of the Church and its identification with temporal power became the particular objects of attack for the political and the theological movements leading to the breakup of the system of medieval unity.

The conflict inherent in this system was described by a modern author in the following way: "The most outstanding characteristic of the international organization of the Middle Ages is *the Pope's right of coercion toward aggressors or disturbers of the established order*. It is an unusually serious problem, for two ideological principles are here in open conflict: the notion of the *ratio divina*, the moral sense of the teachings of the Gospels, and the juridical necessity immanent in every positive order to have

its decisions respected. Natural law here comes into opposition with the precepts of positive law and a theoretical antagonism leads finally to a supreme crisis of the hierocratic system." ²⁴ In this statement the reference to a conflict between natural and positive law is particularly interesting. The specific role of natural law within the legal system of Western Christendom has been mentioned before. If one regards this role in the light of legal theory, it becomes obvious that there is in fact a contradiction in the idea of a natural order authoritatively interpreted and applied in an organized community. For the characteristic feature of natural law is that it exists without being explicitly laid down.

Insofar as the Popes were supposed to apply natural law, they generally were regarded as being bound by this law, not as creating it. But they could authoritatively state what rule of natural law applied to the concrete case; they could formulate and interpret this rule and enforce its observance. If these tasks are performed with regard to a natural legal order, then this order becomes in fact positive. It is immaterial in this respect whether the means used to enforce the rules have a spiritual character so long as they constitute an effective procedure of compulsion. If the legal order which is supposed to be natural is in fact positive, it acquires the features which characterize positive law: the arbitrariness which distinguishes the latter, laid down by man, from natural law, regarded as a system of unalterable rules, and the dependence on force for the maintenance of the legal system. From this point of view the contradiction within the system of medieval unity becomes clearly apparent—that is, on the one hand, the conflict between the idea that there exists a higher sphere above the domain of temporal rule, with its implications of power and politics, and, on the other hand, the actual exercise of power by the spiritual authority.

The movements working toward the disintegration of the medieval system naturally emphasized the incompatibility of the Popes' spiritual authority with their constant interference in political affairs. From the point of view of the present study, which attempts to show the growth of a modern pattern of

thought, it is of particular importance that modern writers have frequently attributed the failure of the papacy to maintain its position as the supreme authority of Western Christendom to the fact that this authority was exercised in the interest of worldly, political goals. Generally these authors criticize not the idea of unity of the Western world but the means by which the Popes attempted to maintain this unity. Examples of this interpretation of the historical development leading to the disappearance of the medieval system can be chosen at random. For instance, an international lawyer writing at the end of the nineteenth century speaks of the grasping worldly ambition of the Popes and declares that while the Emperor failed for lack of power to constitute himself the universal pacificator and arbitrator, the Pope failed in the same task for lack of impartiality.²⁵ It was the same idea expressed in other words when it was said that "the pope by aspiring to universal dominion, fell to the position of a sovereign among sovereigns" and "became a disturbing influence in the political system of Europe."²⁶ Toynbee, in the study referred to above,²⁷ traces the downfall of the medieval papacy back to the fact that the latter became "possessed by the demon of physical violence which it was attempting to exorcize," and that it substituted the material for the spiritual sword. According to this author, the papacy attempted to exercise on its own account "the oecumenical despotism which it had refused to tolerate in the hands of a Barbarossa or a Frederick II," and thus "quickly turned the public opinion of Western Christendom, not only against the Papacy itself, but against the whole principle of oecumenicalism which was now embodied in the Papacy alone."²⁸

Observations such as these reveal certain modern ideas concerning the ideal structure of the global community, but, as will be shown in the course of this study, these ideas are influenced by conditions and concepts which developed during the same period to which these observations refer. The medieval system of unity gave rise to the idea that there was a fundamental difference between the principles underlying the unity of the larger body comprising various political communities and the principles

on which the unity of these communities was based. During a certain period of the Middle Ages Western Christendom formed a unit which, because of some of its particular features, could be called a state. It was kept together by a central organization—the Church—the head of which was the Pope. But the Pope's authority was based on the spiritual nature of his office, and its exalted character seemed to require that this authority should not be exercised in the same manner and by the same means as the authority of ordinary, temporal rulers. Special considerations of power and politics were not supposed to guide the Popes in their actions designed to maintain peace and harmony in the Christian world. The particular "international" structure of the unit formed by the peoples that adhered to the Church was such as to make it possible to distinguish, within the legal system, between a higher and a lower sphere; the higher sphere, although conceived of as legal, being the domain of justice, ethics, and reason rather than of law as applied in the lower sphere. Although, in accordance with this distinction, temporal rulership was supposed to constitute a separate sphere of jurisdiction, the standards of the higher sphere were regarded as applying to the lower and particularly to the conduct of governmental affairs by the temporal rulers. These standards also appeared generally to be applicable to the relationship between temporal rulers who did not recognize a superior temporal authority.

When the unity of the medieval world disappeared and the territorial states emerged as political units fully independent of any larger organization, the idea continued to exist that these states formed a legal community governed by a common legal order. The survival of this idea was facilitated by the separation of the two spheres in the medieval concept. For it was in the higher sphere of natural law, of justice and of ethical precepts, that the universal bond uniting the various peoples was found. The elimination of the central organization, through which the higher rules were interpreted and enforced, could even appear as the natural solution of the conflict which had been inherent in the medieval regime. The existence of such an organization had produced conditions under which the higher sphere appeared

to become confused with the lower and, particularly, to become vitiated by considerations of power and politics. In the absence of an organization the highest rules of the global legal order could be regarded as pure natural law which, without being formulated by any authority, imposed itself directly on the reason and conscience of men. There obviously is a close relationship between the Reformation and the growth of theories which maintained the continued existence, in an unorganized world, of such a law. In view of the connection which existed in medieval thought between the doctrine of natural law and the concept of a divine world order, that doctrine was bound to be affected by a religious movement which repudiated the authority of the Catholic Church and asserted the individual's right of judgment in matters of faith and conscience. The concepts of natural and international law could, therefore, be described as Protestant ideas.²⁹

The disappearance of the common Church coincided with the rise and consolidation of territorial states. The conditions resulting from this development were unfavorable to the growth of the idea that the gap, which the breakup of the medieval system of unity had left in the organization of the world, should be closed by the creation of another organization. The territorial states, which became more and more impervious to influences from without, gradually succeeded in establishing to a certain degree peace and security within their borders. But the same favorable conditions did not seem to be achievable in a political community of wider scope. The anarchical situation, which had resulted from the attempts made during the Middle Ages to establish and maintain a central authority in the Christian world, seemed to furnish an historical proof that it was impossible for such an authority to function effectively. The argument was frequently used that a world state would be too big to permit of effective government.³⁰ In this respect the fact is important that, under the conditions which replaced those existing in the late Middle Ages, it seemed possible to attribute a wider scope to the legal order supposed to bind together various political communities.

The theory that the whole world necessarily constituted a legal unit was expressed in various forms during the Middle Ages. The concept of a natural legal order implied the idea that the rules belonging to this legal order had universal validity. But it was difficult to reconcile that idea with the existence of an organization, the Western Church, which was actually limited to a certain part of the world. When this organization ceased to be effective, the absence of an authority that was limited in its sphere of jurisdiction made it easier to conceive of a natural order as a legal order common to the whole of mankind, including the inhabitants of the newly discovered parts of the earth. It now became difficult, however, to consider as a practical problem the creation of an organization corresponding in scope to such a law of world-wide validity.

An analysis of the development here under consideration would be incomplete if no reference were made to Roman law. This law had been the positive law of the Roman Empire. But its revival in the late Middle Ages took place under conditions quite different from those which had existed under the old empire, and under these new circumstances the role of Roman law underwent an important change: "the very decay of Imperial power in practice rendered [Roman law] rather a set of ideal rules" than an entirely obligatory legal system.³¹ At any rate, "until the 'reception,' the acknowledged force of local customs or laws makes the whole Roman system rather a general norm to which law should try to conform than a purely positive jurisprudence."³² The concept of a general law was maintained, although the corresponding general authority no longer existed,³³ and although particular legal systems to a certain extent at least prevented its application within the various communities into which Christendom was divided. The same process of reasoning, which produced the idea that under these conditions Roman law continued to exist as a system of legal rules, led to the concept that that law had a higher character than ordinary positive law and that, at least insofar as it could be applied to all nations, it was similar to natural law. This manner of thinking survived the end of the Middle Ages. In the treatises *De jure*

belli, first published in 1598, Alberico Gentili declared that Roman law was not merely the law of the states but also that of the nations and of nature. According to him, it was so in accord with nature that the destruction of the empire could not prevent that law's diffusion among all the nations of mankind.³⁴ In Gentili's opinion, Roman law, although established by Justinian for private individuals, also applied to relationships between princes—that is, to international relationships.³⁵ It is not intended to examine the question to what extent those who developed the science of international law followed this example and regarded Roman-law rules as rules of the law of nations. More important here than this question is the fact that the Roman-law concept which arose in the Middle Ages generally contributed to the formation of the idea that, after the disappearance of a central authority, a legal bond continued to unite the peoples which had been subject to that authority, and that the rules which survived the disappearance of the organization, although they still were regarded as legal, appeared to belong to a sphere higher in kind than that of ordinary, positive law.

This idea made it possible, after the disruption of medieval unity and in a world of states recognizing no common superior, to assume that there existed principles which could serve as highest standards of conduct with regard to the manner in which these states were governed and in which they managed their affairs as far as their mutual relations were concerned. In view of these principles the government of a state could be regarded as something more than a matter of expediency and force, and the relationships among states could appear in a light other than that of a senseless struggle for power. The highest standards were considered to be not merely moral but legal rules, and the world thus appeared as a legal community in spite of the absence of a world-wide central organization.

2

GROTIUS' THEORY OF THE LEGAL COMMUNITY OF MANKIND WITHOUT A CENTRAL ORGAN

THE CONCEPT of a legally ordered world community that exists without special organs is presented in Hugo Grotius' treatise *De jure belli ac pacis*, which first appeared in 1625.¹ This book shows the characteristic features of the science of international law as it emerged from the Middle Ages—a science which derived some of its fundamental concepts from medieval conditions but applied them to a situation essentially modified politically as well as with regard to the general manner of thinking. This science forms the basis of all modern ideas regarding the organization of the universal legal community.

Grotius claimed to be the first who treated the law concerning the mutual relations among states in a comprehensive and systematic manner,² and this claim was on the whole well founded. This does not mean that there were no writers before him who had contributed to the development of the new science. But often in the attempt to trace that science as far back as possible in an uninterrupted line, modern scholars have paid insufficient attention to the fundamental difference between the theory developed by Grotius and the ideas of some of the writers considered to be his forerunners. Especially as far as the so-called Spanish School of Catholic authors, often described as Grotius' predecessors,³ is concerned, it must be noted that however similar their concepts of a community of independent states may have been to that of Grotius, the idea of an organization of the Christian world had not disappeared altogether from their theories. For instance, Francisco de Vitoria,⁴ one of the writers rep-

resenting that school, conceived of a general law of mankind governing the relations between Christians and the infidels, who, according to him, were not under the Pope's jurisdiction even with regard to spiritual matters.⁵ But within the Christian world the papacy was still recognized as supreme organ.⁶ While in Vitoria's opinion the temporal power was not subject to the spiritual in the same manner in which one temporal authority may be subject to another temporal authority higher than itself, the spiritual power was higher in kind than the temporal because of the superior ends it served, and the Pope was entitled, for the purpose of attaining spiritual ends,⁷ to exercise temporal power over all princes. Vitoria especially attributed to the Pope the right, in his exercise of temporal power for spiritual ends, to intervene in the case of wars between princes, to forbid their continuation, and to act as a judge between the parties to the conflict.

Grotius considered the claim for influence in worldly affairs made on behalf of the Church to be contrary to the latter's spiritual character.⁸ It is true that he admits the existence of a special bond uniting the Christian peoples.⁹ But, in his theory, no organization of the type and authority of the medieval Church corresponds to that bond. In Grotius' view, the whole world constitutes a legal community, but this community has no organization of its own. He expressly rejects the theory according to which the Emperor is lord of the world, because this theory is contrary to reality.¹⁰ The universal legal community is kept together not by a special organization but by a legal order binding all members of the human race.

This legal order is the law of nature. Grotius defines it as follows: "The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God."¹¹ As a creature endowed with reason, man is capable of ascertaining general principles and of acting according to them. The nature of man from which dispassionate reason can deduce these principles is

characterized by his "sociability," his desire for a peaceful social life. Nature does not impel man to seek exclusively his own advantage; it leads him to seek the maintenance of social order in common with his fellow men. Natural law, which is universal and in principle unchangeable, indicates which conduct the community life of reasonable beings requires.¹²

According to Grotius the law of nature contains rules concerning the right to begin a war as well as rules of warfare. The main purpose of his book was to demonstrate the existence of such rules and thus to contribute to the improvement of the conditions of his time when wars were started and carried on without restraint.¹³

Although Grotius is opposed to the indiscriminate use of force in the international sphere, he does not profess integral pacifism. He raises the question as to whether the waging of war can ever be in accordance with law, and he answers this question affirmatively.¹⁴ Considering the problems from the point of view of natural law, he says that "right reason . . . and the nature of society . . . do not prohibit all use of force, but only that use of force which is in conflict with society."¹⁵ In an organized community, force is used for the maintenance of law, and its use in the global community is equally justified if it serves the same purpose. Grotius likens war to law-enforcement procedures that are applied within states but cannot be followed outside of a statelike organization. In this sense he says: "When judicial settlement fails, war begins."¹⁶ "For judgments are efficacious against those who feel that they are too weak to resist; against those who are equally strong, or think that they are, wars are undertaken."¹⁷ War, therefore, constitutes a method of deciding a legal problem and of executing the decision. Consequently "the sources from which wars arise are as numerous as those from which lawsuits spring."¹⁸ In addition to self-defense, "the obtaining of that which belongs to us or is our due, and the inflicting of punishment" are the general causes for which wars can be undertaken according to the law of nature.

As a method of enforcing the law of the global community, war appears as one of the elements which give that community

its legal character.¹⁹ In the late Middle Ages, Western Christendom had had a central organization through which observance of the legal order could be compelled. In Grotius' natural-law theory, which does not recognize any world-wide central organization, law enforcement can result only from the spontaneous reaction against an unlawful act of the individual members of the global community that are supposed to follow the dictates of reason and conscience. That reaction is war. Grotius develops this theory of war as a legal sanction in a manner which strongly emphasizes the unity and solidarity of the human race.

This solidarity finds expression in the rule which allows a state to wage war even if the facts which constitute a just cause of war do not adversely affect its own interests. As a rule, war is waged by a state in its own interest by virtue of the principle that "by nature everyone is the defender of his own rights."²⁰ But Grotius asserts that by the law of nature, the principles of which apply to the relations among states, each individual is "justified in enforcing not merely his own right but also that of another. The causes, therefore, which are just in relation to the person whose interest is at stake are just also in relation to those who give assistance to others."²¹ To render service to another is not only permissible but honorable.²² Help may be given, therefore, not only to those who are entitled to expect it for a particular reason, such as a treaty of alliance. The common bond of human nature affords sufficient ground for rendering assistance.²³ On the other hand, an alliance does not give the right to aid another state if its cause is not just. Consequently, "alliances . . . entered into with the intention that aid should be rendered for any sort of war without distinction of cause are not permissible."²⁴ The question of the justness of the cause of war also arises with respect to the behavior of those states which take no part in a war. According to Grotius, they have to avoid anything which may hamper the party waging a war for a just cause or may aid the one whose cause is not just.²⁵ There is, therefore, no neutrality in the modern sense of the term, which implies strict impartiality.²⁶

The concept of strict neutrality evidently is incompatible with

a legal system based on the principle of unity and solidarity. In this system war is not merely an act of self-help. When it is waged on behalf of others—that is, when the use of force does not serve any selfish interest—war appears clearly as a method of maintaining law and order in the global community.²⁷ In a world united by a universal law, but without a central organization of its own, the states alone can use force for this purpose. Their rulers thus appear in the role of guardians of the universal law. The global community has no special organization, but it has at its disposal agents entitled to act for the good of the whole community. This situation is expressed in Grotius' treatment of the war undertaken to punish a lawbreaker. According to Grotius, any excessive violation of law gives the rulers of states the right to demand punishments—and not only in case they themselves or their subjects are injured by the breach of law. *"For liberty to serve the interests of human society through punishments, which originally . . . rested with individuals, now after the organization of states and courts of law is in the hands of the highest authorities, not, properly speaking, in so far as they rule over others but in so far as they are themselves subject to no one. For subjection has taken this right away from others."*²⁸ Thus, "kings, in addition to the particular care of their own state, are also burdened with a general responsibility for human society."²⁹

Another case which clearly illustrates the rulers' general authority to maintain the universal law is the war undertaken by a ruler for the defense of the subjects of another ruler, in order to protect them from wrong at his hands.³⁰ To make possible a full understanding of Grotius' theory concerning this case, his opinion regarding the right of subjects to resist their rulers must be mentioned.³¹ Grotius establishes the principle that a subject should not carry out an order issued by the authorities that is contrary to the law of nature; but if, as a result of disobedience, the subject is treated unjustly, he should endure it rather than resist by force. Rebellion is in principle not permitted by natural law because it is contrary to the ends of the state which is established for the maintenance of public tranquillity. Only in exceptional cases³² can rebellion be regarded as justified. But Grotius declares

that a foreign ruler has the right to wage a war for the defense of the subjects oppressed by their ruler even if these subjects themselves are not entitled to active resistance. The reasons for which a subject is prohibited to take up arms against his superiors are not valid with regard to foreign rulers who are not subjects of the oppressive ruler. Here again the rulers of the various states appear in the role of guardians of the universal law. Here the facts which provide the cause of war do not belong, however, to the international sphere, but to the internal sphere of a state. The foreign rulers intervene, in the interest of universal justice, in the internal affairs of a state in order to remedy a wrong of which no redress can legally be obtained within the national community itself.

Grotius' treatment of this case very clearly reveals the concept of unity which underlies his natural-law doctrine. In his theory the law of nature is not merely international law regulating the relationships among states. It is the law of the community of mankind, which is composed of all reasonable beings—that is, of all members of the human race.

As a law imposing itself directly on the conscience of man, natural law is essentially concerned with the individual, whether he be a private citizen or ruler of a state. It is true that the internal life of the states is governed by a type of law which is different from the law of nature. It is positive "volitional" law, which, unlike natural law, has its origin in human will.³³ But, according to Grotius' theory, the existence of the various systems of positive municipal law does not result in a disruption of the unity established by the law of mankind. This law constitutes the universal legal order in which those various systems find their legal basis.

Within the system of natural law, legal obligations can be created by agreements; the law of nature makes them binding.³⁴ Grotius declares that "out of this source the bodies of municipal law have arisen."³⁵ This contractual concept of the state makes it possible for him to derive the state and its law from the natural order, which is the ultimate source of all legal phenomena: "the very nature of man, which even if we had no lack of anything would lead us into the mutual relations of society, is the mother of the law of nature. But the mother of municipal law is that

obligation which arises from mutual consent; and since this obligation derives its force from the law of nature, nature may be considered, so to say, the great-grandmother of municipal law.”³⁶

The rules of municipal law are changeable and are different in different states. But municipal law must generally conform to natural law as to the unchangeable and universal standard of justice and reason.³⁷ It is not necessary here to investigate more closely Grotius’ theory with regard to the relationship between natural law and municipal law. It is sufficient to state that Grotius regards rules of the law of nature as applying to problems arising within the states’ sphere of authority and as demanding observance by the individual subjects of the states.

For instance, Grotius considers the question how the subject, who is ordered by his ruler to fight in an international war, ought to behave if he regards the cause of the war as unjust.³⁸ In Grotius’ theory, international war, “public” war between independent states, is only one of several different types of wars.³⁹ “Private” war, the war between private individuals, is not entirely excluded by the existence of states and law courts; according to Grotius, natural law permits this war when judicial procedure is, for some reason, not available—for instance, when a person injured by another “cannot wait to refer a matter to a judge without certain danger or loss.”⁴⁰ “Mixed” war is war between private persons on the one side and state authorities on the other; in this connection, Grotius discusses the question whether war of subjects against superiors—that is, rebellion—is permitted.⁴¹ It has been mentioned before that, in his opinion, natural law permits rebellion only in exceptional cases. It is not necessary here to examine in detail Grotius’ theory on this subject. It is important only that natural law, as a legal order higher in kind than ordinary positive law, is supposed to regulate questions of this type and that, as shown above, the rule which gives foreign rulers the right to come to the assistance of an oppressed people provides for the enforcement of the higher law against those who exercise the highest authority in the sphere of municipal law.

Ideas such as these disclose a certain similarity between the

legal community of mankind as conceived of by Grotius and the "international state" which Western Christendom formed during the late Middle Ages. In Grotius' theory, as well as in the medieval concept underlying that state, the unity of the legal system is supposed ultimately to result from the existence of a law which is higher in kind than that created in the various political bodies into which the greater community is divided. The higher law is regarded as pervading the whole legal structure and as applying even in the sphere which generally is recognized as that of the rules of inferior type. Through the doctrine of war waged for just causes, a doctrine which had been developed during the Middle Ages, Grotius attempts to liken the global community to a state in which the law is enforced through legal procedures.

But Grotius' legal community of mankind is not a state. In that community there is no common authority above the various political units which can decide the question as to whether a particular act is just or unjust in the light of the higher law. Grotius' theory is significant as an attempt to conceive of the higher law as a purely natural order unsupported by any special organization of the type which made it possible to consider the medieval Christian world as a state in which all individuals belonging to the Catholic faith were united. In the legal system conceived of by Grotius, pure natural law imposes itself directly on the conscience of men who, in case of a violation of law, react against the wrongdoer spontaneously and without being diverted by any higher authority.⁴²

Within the medieval concept of Christian unity the existence of such a higher authority seemed to conflict with the character of the highest rules of the community. In Grotius' doctrine the theoretical difficulty inherent in the medieval concept reappears, but in reversed form. The problem had been how the purity of the higher law could be reconciled with the existence of a central agency which was entitled authoritatively to interpret that law and to compel its observance and which was capable of interfering in the affairs of the lower sphere. Now the problem arose whether, in the absence of a global organization, the higher law

could be regarded as a real legal order. Grotius had to deal with this question. He had to try to refute the opinions of those who denied the possibility of conceiving of a legal order outside of communities organized as states and, particularly, a legal order regulating the relations among states. Grotius' theory raised a new problem—the problem of international law with which all scholars assuming the existence of legal rules binding upon states have had to deal ever since.

Because he was regarded as the first writer who tried systematically to demonstrate the existence of such rules, Grotius has become known as the “father of international law.” But Grotius was a scholar, and his only authority was that of a scholar. What he has created is a science, the science out of which grew the modern theory of international law.

Grotius considers the principles of the law of nature to be “in themselves manifest and clear, almost as evident as are those things which we perceive by the external senses.”⁴³ But considerable scholarly effort is required to ascertain specific rules of natural law. In this respect Grotius follows two different ways: the *a priori* method of demonstrating “the necessary agreement or disagreement of anything with a rational and social nature,” and the *a posteriori* method of concluding “that that is according to the law of nature which is believed to be so among all nations, or among all those that are more advanced in civilization.”⁴⁴ To find out what nations believe, Grotius relies on the testimony of writers whom, in accordance with the universal and unchangeable character of natural law, he selects from different places and different times. If “many at different times, and in different places, affirm the same thing as certain” and if this agreement indicates that the writers have drawn “a correct conclusion from the principles of nature,” then the existence of a rule of natural law seems to him to be proved.⁴⁵

In his search for concordant opinions, Grotius makes a careful selection among writers.⁴⁶ He chooses those whose opinions have most authority and who express the belief of nations “more advanced in civilization.” With regard to the historical examples by which he illustrates his argumentation, he declares that they

have "greater weight in proportion as they are taken from better times and better peoples."⁴⁷ He therefore prefers "ancient examples, Greek and Roman, to the rest."⁴⁸ He obviously could not deduce the rules of natural law from the practice of his own time, which he was trying to improve through the precepts laid down in his book. Grotius' work, therefore, is not descriptive. His law of nature is not natural in the sense that it corresponds to what all human beings actually do or at least to what they all consider to be just or unjust. Freeing his mind from all political considerations which indeed would be incompatible with his task of stating the dictates of pure reason and justice,⁴⁹ the scholar demonstrates these dictates to a world in which they are widely disregarded and not even generally recognized as valid standards of conduct. The question arises necessarily how, under these conditions, the legal system could be effective and particularly how war could fulfill the role of an efficient sanction of the legal order.

In order to regard Grotius' scheme of law enforcement through war as workable, it was necessary to assume not only that the rulers who began a war were able to know what was right or wrong, and willing to act according to this knowledge: it was also necessary to suppose that in every particular case all the other rulers would arrive at the same judgment concerning the cause of war. According to Grotius, the state against which a war was waged for a just cause had no right to defend itself.⁵⁰ There was to be agreement on the justness of a war among the states other than those immediately concerned, so that assistance might be given to the state which used force in accordance with the law of nature and help might be withheld from the wrongdoer. Uniformity of judgment with regard to the cause of a war was also required as far as the legal situation resulting from the acquisition of things through war was conceived. According to Grotius, things may be acquired by war because they are owed to the one undertaking the war or because taking them away constitutes an equitable measure of punishment.⁵¹ Rulership over a people may be obtained in this way.⁵² Acquisition by war is lawful, if the cause of the war is just and if the limits of acquisition established

by the law of nature are observed. Only if they regarded these conditions as fulfilled were all other states obliged to recognize *as valid changes in the legal situation which were brought about by a war. The whole legal system conceived of by Grotius required an investigation by the rulers of states into the just character of actions performed by others, and it could be considered to be workable only on the condition that all rulers judged in an identical way the causes and consequences of a war.*

Grotius was well aware of the practical difficulties arising in this respect. He admits that "certainty is not to be found in moral questions in the same degree as in mathematical science" and that, therefore, in a concrete case, doubts are possible with regard to the causes of a war.⁵³ Under these conditions it is difficult to imagine how third parties can arrive at identical judgments concerning the cause of an armed conflict between two states. But if unanimity of judgment is not guaranteed, the rule which permits third states to take sides in the interest of law and justice may simply have the effect of extending the scope of a war originally limited to two states. Thus Grotius declares that "to undertake to decide regarding the justice of a war between two peoples had been dangerous for other peoples, who were on this account involved in a foreign war."⁵⁴ In the same passage Grotius goes on to say: "From external indications it can hardly be adequately known what is the just limit of self-defence, of recovering what is one's own, or of inflicting punishments; in consequence it has seemed altogether preferable to leave decisions in regard to such matters to the scruples of the belligerents rather than to have recourse to the judgments of others."

Those to whom this practice seemed preferable, according to Grotius, were the nations of the world who, through their consent, introduced another regime than that previously described. Grotius regards consent as the method of creating the law of nations as distinguished from the law of nature. According to the law of nations, war produces certain legal effects regardless of the justice of the cause, on the condition that it is undertaken by the supreme authorities of the states concerned and that it is preceded by a declaration of war.⁵⁵ In this case "it is permitted

to harm an enemy, both in his person and in his property; that is, it is permissible not merely for him who wages war for a just cause, and who injures within that limit, a permission which we said . . . was granted by the law of nature, but for either side indiscriminately.”⁵⁶ Thus, while according to the law of nature those who waged a just war were allowed unilaterally to act in a certain manner against violators of the legal order, the law of nations subjects both parties to identical rules of warfare. By the law of nations a state becomes “owner, without limit or restriction, of what he has taken from the enemy. That is true in this sense, at any rate, that both the possessor of such booty, and those who hold their title from him, are to be protected in their possession by all nations; and such a condition one may call ownership so far as its external effects are concerned.”⁵⁷ In this way rulership over a conquered people may also be acquired.⁵⁸ Peace treaties are valid according to the law of nations even if one party was unjustly induced by fear to give its consent⁵⁹—that is, if the conditions of peace were imposed on him by force in a war the cause of which was not just. The uncertainty concerning the legal consequences of war, inherent in Grotius’ natural-law theory, is eliminated in this concept of war instituted by the law of nations. Third states have “a certain rule to follow” in determining what belongs to whom⁶⁰ and must recognize the rights of the victorious state with regard to the things which it has taken away from the enemy. Thus it becomes clear why Grotius states that the law of nations was introduced “not only for the sake of avoiding greater evil but also to secure each one his right.”⁶¹

The fundamental difference between this concept and the natural-law theory of war is obvious. In the latter theory war is a law-enforcement procedure, the conditions and effects of which are determined by legal rules which emphasize the solidarity of mankind. The law of nations recognizes the outbreak of a war as a practically uncontrollable event which takes place whenever a state freely decides to disturb the peace of the world by waging war against another state. According to the rules of this law, the arbitrary use of force produces changes in the legal situation.

The distinction which Grotius makes between war waged in accordance with the law of nature and war as regulated by the law of nations can be fully understood only if the character of the law of nations and its place within the legal system conceived of by Grotius are defined. Since it has its origin in human will, the law of nations, *jus gentium*, belongs to the category of "volitional" law. It is supposed to be derived not from reason, but from the will of peoples as manifested by custom.⁶²

While the law of nature is the law of the community of mankind, which embraces all members of the human race, the law of nations exclusively regulates the relationships among states. It "concerns nations only, not persons who have no existence as a nation or form a part of a nation."⁶³ There obviously exists a strong similarity between this concept of a law of nations and the theory of customary law which was developed later by the positivist doctrine of international law. It is true that Grotius does not deduce the rules of the law of nations from the practice of his time. The description which he gives of his procedure discloses that he tries to prove the existence of these rules by the same method which he used *a posteriori* to demonstrate the existence of rules of natural law—that is, by showing agreement of opinion among writers and by referring to historical examples. According to him, agreement on a certain question "ought to be referred to a universal cause; and this cause . . . must be either a correct conclusion drawn from the principles of nature, or common consent. The former points to the law of nature; the latter, to the law of nations."⁶⁴ This method of ascertaining the rules of the law of nations clearly differs from that followed by later positivist writers in their search for customary international law. But Grotius' basic concept of a law created by the consent of states, which finds expression in custom, nevertheless corresponds to that developed by the positivist doctrine. Although the law of nations not merely sanctions everything that is actually done in the international domain, it is supposed to be better adapted to existing conditions than the universal and unchangeable natural law. Unlike the latter, the law of nations, according to Grotius, changes in the course of time⁶⁵ and is not the same

in all parts of the world: "outside of the sphere of the law of nature . . . there is hardly any law common to all nations. Not infrequently, in fact, in one part of the world there is a law of nations which is not such elsewhere." ⁶⁶

Regarded from a purely formal point of view, Grotius' system seems to have found its final perfection through the concept of the volitional law of nations. A complete parallel appears to exist between the international sphere and the internal sphere of the state. Municipal law as well as the law of nations has its origin in human will. Both derive their validity ultimately from the law of nature, which makes consent binding. Their existence is justified by considerations of utility and expediency. This parallel between the law of nations and municipal law gives Grotius' system an appearance of completeness and consistency. There is a sphere of law originating in human will governing, on the one hand, the internal affairs of the various states and, on the other, the relations among these states; ⁶⁷ there is another legal sphere, of a higher kind—that of natural law—which permeates the whole legal structure and constitutes its basis.

Closer investigation reveals, however, that the relationship between natural and positive, volitional, law is different in the case of municipal law from what it is in that of the law of nations. It appears that the latter is in a particularly unfavorable condition insofar as it shares with municipal law its inferior character and with natural law its uncertainty of application.

The application of the law of nations is less certain than that of the legal order governing the internal affairs of a state. That law is supposed to be established by the states themselves as a set of rules which in actual practice are to supersede those of natural law. Nevertheless, the law of nations obviously cannot provide the same degree of security that prevails within a state where the law is laid down and enforced through an organization. Like natural law, the law of nations depends for its application on the rulers' knowledge of its rules and on their willingness to obey them. Grotius, therefore, declares that religion is of even greater use in the society of states than in a single state because "in the latter the place of religion is taken by the laws and the easy exe-

cution of the laws." ⁶⁸ In the international domain, according to Grotius, "the enforcement of law is very difficult, seeing that it can only be carried out by armed force, and the laws are very few." Here fear of the divine power is the ultimate guarantee of lawful conduct, "and for this reason those who sin against the law of nations are everywhere said to transgress divine law." ⁶⁹

Municipal law has its immediate origin in the civil power,⁷⁰ which is supposed to be established by consent; the situation is not the same in the case of the law of nations. This law is supposed directly to result from consent. The question necessarily arises how a legal order of the same kind as municipal law can exist under conditions so different from those which make possible, in the internal sphere of the state, the authoritative formulation, interpretation, and enforcement of rules. As far as the legal character of its rules is concerned, the theory of the law of nations, therefore, raises the same problem as the law of nature.

Grotius' law of nations is a science in the same sense as is his natural law. The law of nations, it is true, is supposed to be the product of the will of peoples. However, in the absence of an organization, it obviously depends for its formulation upon the scholar. He discovers the will of states by a process of selecting and interpreting historical examples and the opinions expressed by other writers. The similarity which in this respect exists between the two types of law clearly appears in the fact that Grotius proceeds in the same manner to prove, *a posteriori*, the existence of a precept of natural law and to ascertain a rule of the law of nations.

From the absence of a global organization necessarily follow similar consequences in the case of natural law and in that of the law of nations. In this regard the latter shows certain features which distinguish natural law from municipal law, the law of an organized community. But in the case of natural law, there exists a direct correlation between organizational imperfection and the particular dignity of the sphere to which that law belongs. The law of nations, however, less perfect than municipal law as far as organization and certainty of application is concerned, at the same time has with respect to natural law the

same inferior character as municipal law. As a law emanating from human will and based on considerations of utility, it is on the whole inferior to the law immediately resulting from nature and reason. This relationship between the law of nations and the law of nature is particularly clear in Grotius' theory of war. He declares that everything done in a war which is undertaken in accordance with the law of nations but without just cause is internally unjust. "In consequence the persons who knowingly perform such acts, or co-operate in them, are to be considered of the number of those who cannot reach the Kingdom of Heaven without repentance."⁷¹ Although externally legal ownership is acquired on things taken away from the enemy in such a war, there exists at the same time an internal obligation to give those things back.⁷² The rules of the law of nations, which for reasons of expediency attribute certain legal effects to a war regardless of its cause and thus make it unnecessary for third states to investigate the reasons for which the war is undertaken, therefore leave intact the obligation imposed by the higher law not to go to war unless its cause is just.

The distinction which Grotius here makes between the internal and external effects of an action may suggest the idea that his natural law is nothing but a set of moral precepts. It would be a mistake, however, to interpret Grotius' natural-law concept in this manner. Grotius' law of nature comprises rules which are supposed to be concerned also with external effect.⁷³ Above all, Grotius obviously saw no difficulty in regarding principles, binding by conscience only, as legal rules. He simply followed the medieval method of considering religious and moral questions in terms of law. He adopted this method of thought although its original basis, the authority exercised by the common Church in matters of conscience, had disappeared.

At any rate Grotius' natural law is undoubtedly conceived of as a legal order. It is, in Grotius' opinion, the only kind of law which admits of systematic treatment.⁷⁴ It gives systematic unity to the whole legal structure. All positive, volitional law has its legal basis in the law of nature, from which it derives its binding force. Since the rules of the law of nations are not regarded as

having universal validity, natural law, the law of mankind, alone *makes the whole world appear as a legal community.*

Through his concept of the community of mankind, Grotius transmitted to following generations the medieval idea that various peoples organized in different political bodies were united in a larger legal community under the rule of a law higher in kind than the law of those bodies. Unlike the medieval Christian community, Grotius' community of mankind had no organization of its own. However, his theory marked the beginning of a development which finally led to the rise of the idea that a global organization of the League of Nations type was a practical solution of the problem of universal peace.

There obviously exists a certain similarity between Grotius' natural-law doctrine, which stresses the solidarity of the peoples of the world, and the League of Nations concept of international collaboration in the interest of universal peace and welfare. In particular, the League concept of collective security can be compared with Grotius' idea of mutual assistance in a war waged for just cause, that is, for the purpose of law enforcement in the legal community. But Grotius himself did not consider his natural-law theory of war as a workable scheme of world order. The difficulties inherent in this theory are obvious. A law, which was supposed to prescribe to states a behavior compatible with the common good of mankind, was to apply to a world in which an objective determination of the common good was impossible and in which states were actually free, as far as their respective power permitted, to act in accordance with their particular political interests. In Grotius' theory this difficulty finds expression in a certain conflict between different ideas regarding war waged for just cause. If war is to be regarded as a legal procedure designed to redress a wrong, then it should be expected that force is to be used for this purpose whenever it becomes necessary. But Grotius' theory of war waged for just cause, which permits the use of force only on certain conditions, is primarily meant to restrict the recourse to war. Accordingly he warns the rulers of states not to undertake wars rashly even for a just cause.⁷⁵ He advises them to refrain from a war of punishment in case the

other party is equal in strength, because the rulers' own people whose care is entrusted to them, may suffer if, in such a case, a war is undertaken.⁷⁶ According to Grotius, a state's own interest must be considered before a war is waged on behalf of others. He discusses the question as to whether a state which has the right to undertake such a war has also the duty to do so, and he denies the existence of an obligation of this kind in case the war would be prejudicial to one's own interests.⁷⁷ Grotius here obviously tries to reconcile with conditions existing in the world his concept of an ideal world order based on the reasonableness of man. His theory of war waged in accordance with the law of nations discloses that he considered that ideal order to be wholly impracticable insofar as for its working it required the judgment of third parties in the causes of a war waged between two states.

The idea that in the course of history it would become possible to apply in practice the pure natural-law concept of war was manifestly absent from Grotius' mind. He obviously did not believe that some time in the future men would become so reasonable that they would generally arrive at uniform judgments with regard to the justice or injustice of the causes of wars. If such a stage were ever reached, state practice with regard to war would be expected to correspond to the law of nature; then the rules of the law of nations, supposedly derived from the consent of states as expressed in their customary behavior, would coincide with those of natural law. Grotius did not anticipate, however, a development of this kind.

His main purpose was to prove to the rulers of states that their behavior was subject to legal rules, especially as far as the undertaking of a war and its conduct were concerned, and by this demonstration he hoped to improve the lawless practices of the states of his time. But he evidently did not assume that this improvement would lead to a fundamental modification of the legal system conceived of by him. He clearly considered the reasons which, in his opinion, made the existence of a law of nations necessary to be of eternal validity. He regarded the law of nations followed during certain periods by certain groups of peoples as being better than that adopted by other groups in differ-

ent times. But he did not expect that generally the law of nations would constantly improve until it was identical with natural law, just as he did not expect municipal law to develop in a similar way.

It has been shown above that, in Grotius' system, the supposed parallelism between municipal law and the law of nations was not complete, because the latter, which shared with municipal law its inferior character, could not be laid down and enforced like the law of a state. Theoretically there was a possibility of raising the law of nations to that level of perfection that municipal law possesses. This effect would have been achieved by the creation of a world state. In such a state all law in the world would in fact have become municipal law. However, the idea that the universal state was a goal of the development of mankind obviously did not occur to Grotius. As has been said before, he rejected the idea of a world state because he considered it unsuitable for effective government. Grotius neither expected nor suggested any fundamental changes in the conditions on which his legal theory was based.

3

PUFENDORF'S CONCEPT OF FREE AND EQUAL STATES COEXISTING IN A STATE OF NATURE AND WOLFF'S DOCTRINE OF A FICTITIOUS WORLD STATE

GROTIUS' THEORY marks the first stage of the development of the modern science of international law and, therefore, of the modern pattern of thought regarding the legal bond uniting the states of the world. An analysis of the theories of Samuel Pufendorf and Christian Wolff will disclose the next phases of this development.

SAMUEL PUFENDORF ¹

Pufendorf developed a comprehensive system of jurisprudence on the basis of the natural-law concept. Within this framework he incidentally dealt in various chapters of his books with the legal rules governing the relations between states.

What mainly distinguishes Pufendorf's theory from Grotius' natural-law doctrine is its individualistic tendency, which, as far as the international sphere is concerned, results in a stronger emphasis on the states' independence of one another. Grotius' concept of the global law still was influenced by the idea of unity derived from the "international state" of the Middle Ages. Pufendorf's theory, while it was also based on the principle of universal solidarity, more clearly reflects the disruption of the world into political units which are primarily interested in their own welfare and preservation and which try to retain their freedom of decision with regard to their conduct toward one another.

According to Pufendorf, "the obligation of natural law is of God . . . who by His authority has bound men, His creatures,

to observe it.”² Transgression of the law of nature consequently is a sin. Pufendorf discovers the rules of that law by investigating the nature of man and the conditions of his existence³—that is, by a method of logical deduction from certain premises. He rejects Grotius’ *a posteriori* method of proving the existence of rules of natural law; the general agreement of all men or nations or even of the majority of nations or the more civilized among them does not seem to him to offer a reliable basis for the demonstration of those rules.

Grotius had found in the agreement of nations, as evidenced by custom, the proof of the existence of still another type of law regulating the relationships of states. This law, the law of nations, was supposed to be the positive law of the international sphere, just as municipal law was the positive law of the internal sphere of the state. That law obviously shared, however, the deficiencies of both natural and municipal law. Pufendorf dropped altogether the concept of a law of nations distinguished from natural law. He evidently realized that a law of nations, as conceived of by Grotius, neither had the dignity of natural law nor added to the security of the international sphere. According to him, natural law alone governs the relations among states; the law of nations is but natural law as applied to these relations.⁴ “And there is no reason for any one to make complaints, as if this doctrine destroyed the safeguards of the security, interest and safety of nations, since these surely lie not in such customs but in the observance of the law of nature, which is much more sacred. If this latter be intact, mankind has no need whatsoever of the former. Furthermore, if any custom is based on the natural law, without doubt far more is done to give it dignity than if its origin is based upon the simple agreement of nations.”⁵ In another passage Pufendorf declares that if the rules of a customary law of nations were derived from the actual practice of states, then this law generally would sanction complete licence in their mutual relations.⁶

Pufendorf also discusses the question as to whether international treaties can be regarded as forming a law of nations distinguished from natural law. His answer to this question is nega-

tive. He recognizes, of course, the binding force of agreements concluded between states. Natural law, which makes them binding, commands that agreements be concluded, "since without them social relations and peace . . . cannot be preserved."⁷ They are of particular importance in Pufendorf's system of natural law because certain rights conferred upon a person by natural law are supposed to be imperfect in the sense that they cannot be enforced against another person who does not voluntarily fulfill the corresponding obligation, unless there is an agreement between the parties which makes the right perfect and therefore enforceable.⁸ But, in Pufendorf's opinion, international agreements do not constitute a special legal order comparable to municipal law, which forms a system of general rules applicable to the community as a whole. Treaties between states are "practically infinite in number and for the most part temporary" and they "no more form a part of law than do agreements between individual citizens belong to the body of their civil law."⁹ The legal order of the international sphere is natural law from which treaties derive their legal character, just as within a state agreements of citizens derive their binding force from the rules of municipal law.

Pufendorf's fundamental idea is that states are living together in a state of nature in which all relationships between persons are exclusively governed by natural law.¹⁰ In Grotius' theory as presented in his *De jure belli ac pacis* a direct relationship between the concept of natural law and that of a state of nature was not consistently developed.¹¹ Pufendorf's natural-law doctrine starts from the concept of a natural condition of man in which it is assumed that individuals coexist when they are not united under the authority of a state.¹² The establishment of states has eliminated the natural condition of men as far as the individuals who live in states are concerned. But with regard to the states themselves and their mutual relations this primitive condition still obtains. Since the state of nature in its original meaning is a situation existing among individuals, the assumption that states live in an analogous situation is possible only if states can be compared to individuals as subjects of legal rights and duties. In

Pufendorf's doctrine this possibility results from the concept of the juristic person (*persona moralis*), that is, of the person having rights and duties recognized by law. This concept covers individual human beings as well as corporate bodies, and therefore also states.¹³ Pufendorf thus can conceive of the state, which is supposed to be established by agreements made binding by natural law, as "a single person with intelligence and will, performing other actions peculiar to itself and separate from those of individuals."¹⁴

The idea that states are single persons coexisting in a state of nature has important consequences with regard to the development of thought concerning the character of the global community. Besides the concept of the global community of mankind—that is, of all members of the human race—now distinctly arises the concept of a global community of states. In Pufendorf's theory the law of nature is conceived of as the law of mankind. Pufendorf's whole system of jurisprudence is based on the idea that the existence of states does not exclude the application of that universal law within the various spheres of municipal law.¹⁵ The chief object of states, according to him, is in fact to secure the safe exercise of the law of nature.¹⁶ But the concept that states are persons living together in a state of nature, which the individuals gathered in the states have abandoned, implies that there exists a universal community of which only the states are members. The international sphere, exclusively governed by natural law, thus becomes separated from the municipal sphere where individuals are subject to a legal order which, although not independent of natural law, owes its formulation and enforcement to the state. The individuals appear to be excluded from the sphere in which the law of nature alone regulates the intercourse among states.

Grotius, of course, had also dealt with the legal relationships among states, which, in war and peace, acted as units. The tendency of his natural-law theory, however, was to accentuate the unity and solidarity of the members of the human race in spite of its division into states. His law of nations, it is true, was supposed to regulate only the mutual relations of states. But the con-

cept of the law of nations, the volitional law adapted to existing conditions in the international sphere, made it possible to consider the world as a unit governed throughout by the same two kinds of law, natural and volitional—the former, the law of mankind, being uniformly superimposed on the latter in the national as well as in the international domain. In Pufendorf's doctrine, the natural-law concept itself strongly emphasizes the division of the world into separate units, the states, which appear as coexisting in a legal sphere that is of a different order than the legal sphere in which the individuals composing the states live together.

According to Pufendorf, the state of nature, which is the condition of the international sphere, is the state of natural liberty because those who live in this condition are "subject and responsible to none but God."¹⁷ They have the right to regulate their conduct according to their own judgment. Every one in the state of nature enjoys natural liberty equally. Natural law prescribes that every man should treat another man as his equal by nature, since human nature belongs equally to all men regardless of their individual, physical, or mental strength or weakness.¹⁸ In the state of nature, equality means that no man is subject to another's authority.¹⁹ This principle applies to states which, as persons coexisting in the state of nature, enjoy equality regardless of their size and power.²⁰ Thus the legal concept of the equality of states arises, which later became an important feature of the theory of international law.²¹

The concept of the equal natural liberty of the persons living together in the state of nature is the basic element of Pufendorf's theory of natural law, which is characterized by its strongly individualistic tendency. This natural liberty is not to be regarded as being equivalent to complete licence. "The term 'the natural liberty of man' . . . should under all circumstances be understood as something conditioned by a certain restraint of sound reason and natural law."²² The manner in which Pufendorf deduces the fundamental principles of that law from the nature of man and the conditions of his existence²³ clearly discloses the individualistic tendency of his doctrine. Man, according to

him, is primarily characterized by his love for himself and the desire for self-preservation. On the other hand, he depends upon his fellow men, without whose help he is unable to exist. "For such an animal to live and enjoy the good things that in this world attend his condition, it is necessary that he be sociable, that is, be willing to join himself with others like him, and conduct himself towards them in such a way that, far from having any cause to do him harm, they may feel that there is reason to preserve and increase his good fortune."²⁴ These considerations apply to states as well as to isolated individuals.²⁵

The individual's interest in his own advantage and preservation thus is for Pufendorf the starting point in determining the natural condition of man, although self-love is ultimately to be reconciled with the requirements of social life and the duties of sociability. Pufendorf explains that, in investigating the condition of man, he assigns the first place to self-love "not because one should under all circumstances prefer only himself before all others or measure everything by his own advantage, distinguishing this from the interests of others, and setting it forth as his highest goal, but because man is so framed that he thinks of his own advantage before the welfare of others for the reason that it is his nature to think of his own life before the life of others. Another reason is that it is no one's business so much as my own to look out for myself. For although we hold before ourselves as our goal the common good, still, since I am also a part of society for the preservation of which some care is due, surely there is no one on whom the clear and special care of myself can more fittingly fall than upon my own self."²⁶ Under these conditions a harmonious common life seems to be conceivable only if every individual living in the state of natural liberty considers his interest not in the light of temporary expediency but in that of "sound reason" which demonstrates the advantage of mutual friendship and peace.²⁷ But, taken in this sense, the individual's interest in his own advantage is of primary importance among those natural conditions from which Pufendorf derives the principles of the law of nature.²⁸ His concept of natural law appears to be based on the idea that reasonable persons coexisting in the

state of nature can achieve a peaceful and harmonious common life if every one of them is guided in his conduct by his reasonably conceived self-interest.

From this viewpoint peace can be regarded as the natural condition of mankind. The state of nature is, as Pufendorf maintains against Hobbes, not a condition of general war.²⁹ Persons living in that state are allowed only under certain circumstances to use force against each other. In general, Pufendorf follows in this respect Grotius' natural-law theory of war waged for just causes. But his concept of natural law as applicable to persons living in the state of nature necessarily leads to a modification of Grotius' theory in some significant points. In Pufendorf's doctrine, war becomes an act of self-help performed by an injured state rather than a legal procedure. If, in the state of nature, a person enforces his right against another, he does not act as a judge, at any rate not in the sense that his decision is valid for the other party or any one else. Such an effect would conflict with the principle of natural equality according to which the opinions of all persons living in the state of nature have equal weight.³⁰ In conformity with this view, Pufendorf rejects the idea of a war of punishment. One of the reasons for which war may be undertaken is "to obtain reparation for losses which we have suffered by injuries, and to extort from him who did the injury guarantees that he will not so offend in the future."³¹ But such a war has not the character of a penalty, which can be inflicted only where there are superiors and subjects—that is, where a state exists. "For in war his guarantee or protection is secured by every man by his own strength and at his own judgement, while by punishments it is secured for the injured parties by the strength and at the judgement of their superior. That a person should be overcome and coerced in war is the interest only of him who was injured, but that a man should receive civil punishment is not the interest of such a person only but of the entire state. So also the question whether an injured person wishes to revenge his injuries by war, is left entirely to his own discretion, but whether a civil penalty is to be required, lies in the power of a superior, who can require it even over the head of the injured party."³² In

the same connection, Pufendorf declares: "*If a crime has been committed against me in a state of natural liberty, I can require reparation for the loss and guarantee for the future by recourse to war. But if the sin was against another, whose defence has not been laid upon me as a special charge, I can no more take upon myself to avenge him, unless bound to him by a treaty, than to pronounce laws to such as are not subject to me.*"

Here Grotius' concept, that the rulers of the states act as agents of the community of mankind for the maintenance of law in that community, has entirely disappeared. The principles of natural liberty and equality generally do not allow a state to judge anything but its own rights and duties nor to use force in support of other than particular interests. As a rule, a state may assist another state which has a just cause for war only if there exists a special reason to do so.³³ Pufendorf recognizes that defending another state against the manifest injuries of its enemies may generally be regarded as a means of advancing the common good of mankind. But he warns in this connection that

there ought to be some restraint . . . so that not every man, even though he live in natural liberty, should have the right to coerce and punish by war any person who has done any other person an injury, on the sole excuse that the public good demands that injuries to the innocent should not go unpunished, and that what concerns one should concern all. For since he who is attacked in this fashion is not deprived of his right to meet with equal violence the violence of him whom he himself has never injured, the result would be that for one war to distress and embroil mankind there would be two. Nay, for a person to thrust himself forward as a kind of arbitrator of human affairs, is opposed even to the equality granted by nature, not to mention the fact that such a thing could easily lead to great abuse, since there is scarcely a man living against whom this could not serve as an excuse for war. Therefore, an injury done another can only give us cause for war when the injured party calls upon us for aid, so that whatever we do in such a case is done not in our name but in that of the person wronged.³⁴

Pufendorf rejects also Grotius' opinion that a war can be waged in order to help a people oppressed by its ruler even in case this people itself has no right to resist the ruler by force.³⁵

Grotius' natural-law theory, in which war had the character

of a law enforcement procedure, presupposed uniformity of judgment in the world with regard to the justness of a war undertaken by a state. Grotius was aware of the fact that this ideal condition could not be realized, and he therefore introduced the theory of the war waged according to the law of nations. But the introduction of this theory left his natural-law theory intact as an ideal concept of world order. In Pufendorf's doctrine, where war appears essentially as a method of enforcing the particular rights of a state, the natural legal order recognizes the possibility of disagreement concerning the cause of a war as a consequence of the rights which each person living in the state of nature enjoys by virtue of the principles of natural liberty and equality. For according to these principles, each person can decide for himself what his rights are, but no other person is bound by this decision. If, in accordance with the law of nature, a war is undertaken for the enforcement of a right, it regularly appears as the outcome of a conflict regarding the interpretation of the respective legal rights and duties of two states, a conflict which neither of the parties can decide in such manner that the decision will bind the other party or third states.

Under these conditions it is understandable that, according to Pufendorf, natural law does not allow "every man by his own judgment, to determine his right to take up arms at once . . . before less violent means have been tried."³⁶ An attempt to avert war by the use of peaceful procedures should be made even in case a person is persuaded of the justice of his own cause.³⁷ Pufendorf enumerates three methods which can be used in the state of nature for the prevention of war: "either a conference between the parties concerned or their representatives; or an appeal to arbitrators; or finally, the use of lot."³⁸ These methods were already mentioned by Grotius where he discussed the doubtful causes of war—that is, the cases in which the justness of the cause is doubtful to the one who contemplates the waging of a war.³⁹ But the question of peaceful procedures for the settlement of disputes occupies a more important place in Pufendorf's doctrine. He devotes a whole chapter of his *De jure naturae et gentium*⁴⁰ to the "manner of settling disputes in a state of natural liberty."

In this chapter he mainly deals with arbitration which, in this connection, appears particularly important as a procedure leading to the solution of the legal problems underlying the dispute.⁴¹ When other peaceful methods do not result in the settlement of a conflict, the parties, according to Pufendorf, should leave to an arbitrator the decision of the case and should bind themselves to abide by this decision.

In the chapter in which he discusses arbitration, Pufendorf mentions still another method which in the state of nature can be used for the preservation of peace.⁴² This method is mediation of third states between two countries preparing for an armed conflict or already engaged in war. Mediators may spontaneously make an attempt to bring about a peaceful settlement of a dispute. Joint mediation by several states especially interested in having the conflict settled is also possible, and Pufendorf demonstrates that it can be undertaken in such a way as to make it an effective procedure for the preservation or restoration of peace. "Two or more to whose interest it is for the war to cease, upon weighing the cases of both sides, may agree on what terms they feel peace can be most fairly secured; and then they can offer these to the warring parties with a threat that, against him who refuses peace on those terms, they are ready to join arms with him who accepts them." Pufendorf considers this procedure to be compatible with the natural liberty of the parties to the dispute. "For such a course a man does not thrust himself in as an arbitrator upon another against his will, or undertake the decision of a quarrel by his own authority, neither of which natural liberty allows." For the proposal made by the mediators is not binding on the states to which it is offered. The threat of war with which that proposal is combined is regarded by Pufendorf as legitimate because "by natural law a man is able to join arms with him who feels that an injury is being done him, especially when such an injury will entail some damage to himself as well." Pufendorf explains that the interest of third states in peace, which justifies their intervention, results from the fact that a war between two countries can endanger the safety of those not directly involved in the conflict. "Some sparks from the neighbor-

ing fire may be carried" to those states, or the destruction of one or both of the parties may be prejudicial to them. Intervention of the type described by Pufendorf, therefore, appears as an action undertaken under certain political conditions in the intervening states' own particular interest. Joint mediation, nevertheless, has the purpose of maintaining peace through the equitable settlement of a dispute between two states. It thus can be regarded as serving the general interest, and Pufendorf therefore recommends the use of this procedure whenever it is feasible.

One may be tempted to compare this concept of collective mediation to certain clauses of the Covenant of the League of Nations, which provide for common action to be undertaken in the interest of peace. It would be a mistake, however, to assume that Pufendorf thought of the possibility of maintaining peace through a general agreement of the type of the Covenant, by which the states of the world assume the obligation to act in common for the preservation of peace in all cases of a certain type defined in the agreement. That such an idea was incompatible with Pufendorf's concept can be inferred from what he says with regard to treaties designed to maintain peace. He considers as useless treaties which simply reproduce the rules of the law of nature insofar as they prescribe the maintenance of peace as the natural condition of mankind and forbid the unjust injury of another person. Pufendorf declares that

it is of no advantage to fortify this universal peace by agreements or treaties; for by a treaty of this nature no addition is made to the obligation of the natural law, that is, the convention does not add anything to which men were not already bound by the very law of nature, nor does it make the obligation more binding. For we suppose that both parties remain so fully in their natural equality that they are obligated to keep their agreement by no further bond than their reverence for God, and their fear of the evil which might come to each man from a violation of his agreement; although for one not to observe what he has expressly promised seems to add something to his improbity and baseness. The same freedom of action is allowed the injured party against a violator of a law of nature, whether an agreement had been entered into or not. And so civilized men have avoided entering into an agreement, the articles and conditions of which have no content other than the promise not directly to violate

something which had already been expressly stipulated by nature. Such an action implies little reverence for God, as if His command did not lay upon us a strict enough necessity, and so we must needs agree to it of ourselves, or as if His obligation depended upon our choice.⁴³

In this connection Pufendorf may primarily have thought of bilateral treaties by which two states promise each other to observe the law of nature insofar as it prescribes the preservation of peace. But the principle which he lays down with regard to such treaties evidently is capable of a more general application. It seems *to imply that as long as the state of nature exists between states—that is, as long as there is no superstate*⁴⁴*—a general agreement is useless which is entered into with a view to strengthening the security of the international sphere.*

Pufendorf's ideas on treaties simply confirming the law of nature evidently are based on considerations similar to those which made him reject the concept that there exists a law of nations as a general legal order distinguished from natural law. In the state of nature, the observance of the rules of natural law, which prescribe the preservation of peace and permit the use of force only under certain circumstances, can be expected only if all persons enjoying natural liberty are motivated in their conduct by reason and good will. If the states themselves lay down rules concerning their general duties with regard to the maintenance of peace and to the waging of war in the international sphere, the observance of these rules depends on the same conditions as the application of natural law. The establishment by tacit or explicit consent of such rules, therefore, does not increase the security of the world, whether the rules simply confirm the precepts of natural law or are intended to modify them. As far as the general problems of war and peace are concerned, the essential features of the situation of persons living in the state of nature cannot be altered by human will. In this sense, natural law, the law derived from that situation, is sufficient as the legal order of the global community.

Pufendorf does not assume, however, that the existence of the natural legal order actually guarantees the preservation of uni-

versal peace. He realizes the fact that "natural peace is but a weak and untrustworthy thing."⁴⁵ Men, although endowed with reason, do not always use this faculty but frequently allow their evil passions to determine their actions. The principle of natural liberty, which permits every person to regulate his conduct according to his own interpretation of his rights and duties, is a source of conflicts.⁴⁶ The law of nature provides for arbitration as a means of settling disputes. But "even this will not constitute a sufficient guarantee of peace. For easy as it is for man to sin against the other laws of nature, so easy also is it for him to scorn arbitrators and take recourse in arms. Nay, since the parties agreed upon an arbitrator by a pact alone, it will not be difficult, in case his decision be distasteful, for that pact to be trampled under foot by the one whose confidence in his own strength promises him licence of action, among his fellows; especially in view of the fact that the arbitrator can have no authority to force the parties to abide by his decision."⁴⁷

That the state of nature is a state of peace, then, only means that, in a community in which every one primarily cares for his own advantage and relies on his own strength for its realization, war is not unavoidable and that peace and harmony naturally exist between the interests of the members of such a community if every one of them adopts a reasonable behavior as prescribed by natural law. The idea that the states are not subject to human laws but live together under the exclusive rule of a legal order the observance of which ultimately depends not on their fear of human punishment but on their reverence for God gives the international sphere its particular dignity. This dignity distinguishes it from the internal sphere of the state, where peace and harmony depend on an organization and on a legal order created and enforced by men. But Pufendorf admits that, in fact, persons living in the state of nature do not always follow the dictates of reason and that, therefore, there is, in a community exclusively governed by natural law, no such security as exists within a state.⁴⁸

To avoid the insecurity inherent in the state of nature, men, according to Pufendorf, gave up their natural liberty and gath-

ered into states. These states are supposed to owe their existence to agreements; they are therefore not natural in the sense that they are directly established by nature. But since their object, in Pufendorf's opinion, is to secure the safe exercise of natural laws, which is not ensured in a state of nature, it can be said that "there is nothing in natural laws which is repugnant to the nature and end of states, but that, on the contrary, they are in friendly agreement with their design."⁴⁹ In this sense Pufendorf declares that "government, indeed, is a natural thing, and it was nature's intention that men should set up governments among themselves."⁵⁰

The question then arises as to why nature does not also favor the establishment of a world state which would eliminate the state of nature even insofar as the coexistence of states is concerned. Pufendorf shares Grotius' opinion that a world state would be too big for effective government.⁵¹ But he regards a universal state not only as impracticable; he also maintains that the condition of free and equal states, although full of dangers, is not entirely comparable to that of isolated individuals. He assumes that the most urgent need of security which led men to the establishment of states was satisfied once these states existed, and that there is no similar need of universal government. According to him the state of nature, limited to the coexistence of states, "lacks those inconveniences which are attendant upon a pure state of nature . . . furthermore, it is felt that the height of mortal achievement has been attained, when security rests upon the strength of the entire state, and where one recognizes no man on earth to be his superior." Pufendorf goes on to say that states and their rulers, therefore, "may properly claim for themselves the distinction of being in a state of natural liberty, when they are girded with the powers which allow them its secure enjoyment, while it is a thing of little joy or use for those who enjoy individually a pure state of nature to have no superior, since the weakness of their own resources makes their safety hang by a thread."⁵²

The distinction which in this respect Pufendorf makes between states and individuals became of great importance in the later stages of the theoretical development which is the object of

this study. From that distinction the assumption arose that the absence of a world government was as natural as the existence of governments in the national communities. Some ideas expressed by Pufendorf seem directly to lead to that assumption. According to him, it was nature's intention that men should set up governments; but he states that "it was no less the purpose of nature that he who holds supreme authority over other men should be free from any interference on their part, and should thereby enjoy natural liberty; unless, indeed, we choose to admit into the same order something superior even to what is supreme. And for this reason it is in accordance with nature that the man who has no master should govern himself and his actions by the dictates of his own reason."⁵³ In this connection it must be noted that, in Pufendorf's opinion, the pure state of nature—that is, the state of nature among absolutely isolated individuals—never actually existed, since men were always united, if not in states, at least in analogous bodies such as family groups.⁵⁴ There was, therefore, practically always a sphere where natural law alone reigned, but this sphere was always one in which not individuals but groups of individuals coexisted. It thus seems possible, on the basis of Pufendorf's theory, to regard as part of the natural order the existence of a community of free and equal groups under a legal order distinct from that which regulates the relations between individuals.

CHRISTIAN WOLFF⁵⁵

Pufendorf's idea that the relations between states were exclusively regulated by natural law did not find many adherents among the scholars who, after him, developed the science of international law. The development of this science, which kept alive the idea that there existed a body of legal rules binding upon independent states, led to the rise of the positivist school which became predominant in the nineteenth century. But although the positivists were fundamentally opposed to the way of thinking of the natural-law school, their theories nevertheless were decisively influenced by it. In this respect Pufendorf's natural-law doctrine, in which the world appeared as a legal community of naturally free and equal states, was of particular importance.

The theory of Christian Wolff illustrates the process by which natural law concepts entered into the positivist doctrine of international law. That theory, which follows the trend of thought which had characterized Pufendorf's natural-law doctrine, is based on the assumption that, in addition to natural law governing the relations of states, there exists a positive law of nations. It is possible to discern in Wolff's work the beginning of a development leading to a theory which relegated the dictates of reason to the realm of morals and tried to demonstrate the existence of a purely positive international law—which, however, still derived some of its fundamental principles from the natural-law concept.

Like Pufendorf, Wolff regarded states as free and equal single persons living together in the state of nature; ⁵⁶ the law governing the conduct of persons coexisting in this condition is natural law.⁵⁷ The idea that this law is the law of mankind still is the starting point of Wolff's theory. Nature, according to him, has established a legal bond among all men, and this bond is not destroyed by the existence of states, which were created through agreements concluded in accordance with the law of nature.⁵⁸ But the fact that individuals have gathered in different states has the effect that "that society which before was between individuals continues between nations," each of which is a person having its own intellect and will. Thus, after the establishment of these bodies, the global community clearly appears as a community of states. This community is governed by a special legal order, the law of nations. Wolff devoted a separate volume to the systematic presentation of this legal order.⁵⁹

In Pufendorf's theory the law of nations had been identical with natural law. In this theory the parallelism had disappeared which Grotius had established between the international sphere and the sphere of municipal law. Grotius had conceived of a law of nations which was the positive, volitional, law of the international sphere and which, in the same manner as municipal law, was subordinated to the natural law of mankind, the common basis of all positive legal rules and the link between all human beings and between all the various legal spheres. Although Wolff strongly

emphasizes the parallelism between the international and the municipal sphere, he does not simply reestablish Grotius' concept. In his doctrine, the term "law of nations" covers the natural as well as the positive law of the international sphere. Natural law is a universal and immutable standard of justice and reason, applicable to the internal laws of the various states⁶⁰ as well as to the positive law regulating the relations between states. But the law of nature as applied to nations, which Wolff calls the "necessary law of nations,"⁶¹ is supposed to differ from natural law as applied to individuals. "For the principles of the law of nature are one thing, but the application of them to nations another, and this produces a certain diversity in that which is inferred, in so far as the nature of a nation is not the same as human nature."⁶² Thus in Wolff's theory the sphere of the law of nations is clearly distinguished and separated from that of municipal law, and the distinction and separation appear already on the highest legal level, the level of natural law. The necessary law of nations is the natural immutable legal order of the global community of free and equal states in which the individuals composing the states in principle have neither rights nor duties. According to this theory, it ultimately depends upon the rulers of the states to what extent the law of nature, which is the standard of justice with regard to the municipal sphere, is observed in that legal sphere. Wolff deduces from the natural liberty which the states enjoy as persons coexisting in a state of nature their right to manage their internal affairs without outside interference.⁶³ From this principle of noninterference he derives the rule that if a ruler oppresses his subjects, another ruler has not the right to use force for the defense of the oppressed people.⁶⁴ Thus Wolff definitely abandons Grotius' idea that a wrong done within a state can find redress through force used rightfully in the international sphere—that is, by the ruler of another state acting on behalf of the global community for the maintenance of the general standards of reason and justice.

In his theory of the necessary law of nations, Wolff follows the individualistic tendency of Pufendorf's natural-law concept in which the care for a person's own reasonable interest appeared

as the fundamental element of human life. Wolff assumes that, since nations need each other's assistance, nature has established society among them, the purpose of which is the promotion of the common good.⁶⁵ Among the duties which the natural law of nations is supposed to impose upon a state, the acts which it is bound to perform or omit for itself occupy the first place.⁶⁶ *A nation owes to itself above all self-preservation, which "depends upon the continuance of its union into a state,"*⁶⁷ *and self-perfection, which "depends upon its fitness for accomplishing the purpose of the state."*⁶⁸ Fulfillment of a nation's duties toward itself is supposed to be in the interest of the other members of the global community, since a nation would be unable to fulfill its obligations toward others unless it perfects itself.⁶⁹ With regard to the duties toward others, Wolff lays down the principle that "every nation owes to every other nation that which it owes to itself, in so far as the other does not have that in its own power;"⁷⁰ every nation is bound "to contribute to the preservation and perfection of another nation in that in which the other is not self-sufficient."⁷¹ But this principle applies only if the first nation can act for the other "without neglect of duty toward itself."⁷² In case of a conflict between duty toward itself and duty toward others, the first obligation prevails.⁷³ Moreover, by virtue of the principle of natural liberty, each state is to judge for itself whether it can do anything for another without neglect of its duty toward itself. Consequently, "the right of nations to those things which other nations owe them by nature, is an imperfect right."⁷⁴ No coercion can be used, and especially no war can be waged to enforce such a right,⁷⁵ although a nation sins if it does not fulfill its natural obligations toward others.⁷⁶ According to Wolff, imperfect rights can be transformed into perfect rights by mutual consent—that is, by international treaties in which states promise to do something which is owed only imperfectly under the law of nature. Thus, for instance, "nations are bound by nature to engage in commerce with each other, so far as is in their power,"⁷⁷ but the natural right to engage in commerce with another nation is an imperfect one which can be made perfect only through agreements.⁷⁸

The necessary law of nations permits the waging of war for just causes only. In defining the just causes of war ⁷⁹ Wolff follows the trend indicated by Pufendorf's theory rather than Grocius' concept. In his theory, war is essentially an act of self-help. In principle a state is entitled only to enforce its own rights. Like Pufendorf, Wolff emphasizes the duty of states, before beginning a war, to attempt the settlement of their controversies by the methods which are available to those who live together in a state of nature. The controversies between nations "are their disputes concerning the rights belonging to them or concerning a wrong done." ⁸⁰ In the state of nature there is no judge to decide such disputes between persons enjoying natural liberty. ⁸¹ But, according to Wolff, from this fact it only follows that each state decides for itself what its rights and duties are. It does not follow that victory in war determines who is right and who is wrong. ⁸² War is "not suitable for deciding a controversy between nations," ⁸³ a controversy in which, although a war cannot be just on each side, ⁸⁴ each of the parties "assumes that the right belongs to him, but denies it to the other." ⁸⁵ Such a dispute can be settled "either amicably or through compromise, or through mediation, or arbitration," ⁸⁶ and states are bound to attempt a settlement through one of these methods. ⁸⁷ Wolff considers a war to be illegal which is undertaken for the purpose of deciding a disputed right: ⁸⁸ "the right of war as such belongs to no one in a doubtful case, and it is illegal to harass another in war, so that you may by force of arms extort what you claim." ⁸⁹ On the basis of these considerations, Wolff arrives at the conclusion that in the case of a dispute "the right of war does not arise from the fact that nations do not have a judge, but are themselves defenders of their own right; but from the wrong of the nation in refusing the method properly offered it by the other party for settling the controversy by the law of nature." ⁹⁰ If, therefore, in a disputed case ⁹¹ a state is not willing to accept an offer to settle the dispute by peaceful means, the state making that offer has the right to go to war against the other party and to force it to accept a settlement of the conflict. ⁹² Here a new criterion regarding the permissibility of a war according to the law of nature appears; a criterion based

not on the justice of the underlying cause, but on a state's compliance or noncompliance with certain rules of procedure, the purpose of which is the preservation of peace.

This new criterion of a just war clearly illustrates the difference between Wolff's concept and Grotius' doctrine. In Grotius' theory war had appeared as a legal method of enforcing the universal law. This theory showed certain inconsistencies resulting from the difficulty of likening wars to the law-enforcement procedures of municipal law. Nevertheless, Grotius' community of mankind governed by natural law resembled a state insofar as the global legal order was enforced against all wrongdoers by states which could act not only in their own interest but also on behalf of the global community. Particularly the concept of punitive war waged by a state which was not directly injured by the breach of law disclosed the idea that these were rules the enforcement of which served the general interest of the community, just as in a state the enforcement of criminal law interests the community as a whole. When Wolff, following Pufendorf's example, eliminated the concept of a war of punishment as understood by Grotius, because this concept was incompatible with the principles of the equality and liberty of states, there remained as causes justifying a war violations of the particular rights of individual states, which were supposed ordinarily to concern only the parties to the conflict. Moreover, in Wolff's theory, the question as to whether a state has injured another generally is the subject of a controversy between the two states concerned. This controversy cannot reasonably be solved by war, but its reasonable solution seems to be guaranteed when one of the peaceful methods is followed which are available to those living in the state of nature. War then finally appears to be justified as an ultimate means of compelling a state to adopt a peaceful attitude, rather than as a general means of enforcing the observance of a state's particular obligations.

In Wolff's opinion the maintenance of peace is the concern of the global community as a whole. He therefore assumes that the whole community can compel a state to refrain from disturbing peace without regard for the dictates of reason.

According to him, natural law allows all nations together, under certain conditions, to wage war against a disturber of public peace and security—that is, against a state which unjustly attacks others for no other reason than love of war and power.⁹³ Wolff assumes that nature itself has united all nations in a supreme state (*civitas maxima*), a global body comparable to the national communities in which the individuals are combined.⁹⁴ From the concept of the supreme state he derives the idea that the whole global community—that is, all its members—can use war as a means of coercion against a wrongdoer.⁹⁵ The joint coercive action has the purpose of restraining and punishing disturbers of the public peace. The general interest requires the maintenance of peace and security in the international community, because the war which an unjust aggressor undertakes recklessly has detrimental effects, not only for the state directly attacked but also for neighboring and even far distant countries.⁹⁶ The war against the disturber of the peace is supposed not only to be undertaken in the common interest of the world, and even to constitute an act of compulsion performed with the combined forces of the universal community. This community appears to be interested only in the maintenance of general peace which makes it possible for the individual states themselves to settle the controversies regarding their mutual rights and duties in a reasonable manner. But insofar as there appears to be a method of enforcing law in the common interest, the universal community seems to resemble a state just as Grotius' community of mankind seemed comparable to a state. Wolff emphasizes this similarity.

Closer investigation of Wolff's theory shows, however, that what is supposed to be a joint action undertaken by the whole community against an isolated wrongdoer actually has a quite different character. Wolff considers it neither desirable nor necessary that all states participate in the war against a disturber of the public peace. According to him it is sufficient that "those who have the most interest in diminishing the excessive power of the disturber" take part in the struggle against him.⁹⁷ The fact that Wolff speaks in this passage of the excessive power of the violator of peace is particularly important because he deals here with the

question of joint coercive action in connection with the problem of the equilibrium among states, the balance of power.⁹⁸ In this connection the disturber of the peace appears to be a state, or group of states, which through its overwhelming power threatens to subject other states to itself and thus to change the character of the global community as a community of free and equal states. Wolff defines equilibrium as "such a condition of several nations so related to each other in power that the combined power of the others is equal to the power of the strongest or to the joint power of certain ones."⁹⁹ When a balance of power exists, "it may happen that on the occurrence of war like force may be opposed to the one assailing by force;"¹⁰⁰ then "it would not be necessary that one nation should succumb to the arms of the other, and so provision is made by that means for the common security of nations."¹⁰¹ Thus the balance of power is "especially conducive to their [the states'] liberty and the disturbance of the equilibrium is very dangerous to liberty."¹⁰² Wolff, therefore, recommends that if a state threatens to carry out a project of unjustly subjugating other countries, the states which are afraid of these plans should conclude alliances early enough either to deter the presumptive aggressor or to be able to assist in time the one against which the attack is directed.¹⁰³ In case of a serious danger arising from the fact that a powerful state manifestly considers the subjection of other states, the slightest injury done by that state to any one of the allies is supposed to give all of them the right to destroy by armed force the power of the disturber of peace for the purpose of preserving the equilibrium.¹⁰⁴ The possibility of war waged under such conditions for the preservation of equilibrium and thus for the maintenance of the particular structure of the global community as a community of free and equal states evidently does not make that community resemble a state. That war actually is a struggle between rival groups of approximately equal strength, between hostile power combinations into which the universal community is divided. As far as participation in the war on either side is concerned, the states obviously are guided by their own political interests rather than by the general interest of the world as a whole.

The concept of equilibrium is a political principle which determined the state practice of Wolff's time.¹⁰⁵ In Wolff's opinion the states have to use political methods in the interest of their security because reasonable behavior does not prevail throughout the world. In a community of perfectly reasonable persons, considerations of power and politics would be without any importance. Wolff declares that, if all states strictly fulfilled the obligations toward each other which the law of nature imposes on them, "nothing would have to be feared by the weaker from the stronger,"¹⁰⁶ and a balance of power would be unnecessary because there would be no risk of war.¹⁰⁷ In an ideal world community there would be permanent peace.

In this respect also Wolff's natural-law theory differs from Grotius' concept. Grotius thought that war could be avoided completely if all mankind lived in accordance with the highest standards of ethics.¹⁰⁸ But the ideal, although not realizable, condition of mankind, as he conceived of it, did not presuppose the complete absence of wrong to be redressed by force. War as a means of law enforcement was an essential element of the natural world order as a legal system. In Wolff's natural-law theory the justification of war is also based on the idea that the use of force is necessary for the redress of wrong done in the global community. In this sense Wolff says: "To no purpose would the law of nature prohibit injury to nations if nation were permitted to injure nation without punishment."¹⁰⁹ In his theory, however, a tendency clearly arises to regard the ideal condition of the global community as characterized not by the regularity with which lawful conduct is enforced but by the absence of unjust behavior that makes compulsion necessary. Wolff generally considers war to be incompatible with man's reasonable nature. Natural law permits war as an unavoidable evil only because states do not always follow the dictates of reason.¹¹⁰

Wolff obviously assumes that among perfectly reasonable nations peace and order could be maintained through strict observance of the necessary, natural, law of nations. In his opinion there would be harmony (*concordia*) among the wills of states if these were guided by the precepts of that law¹¹¹ which recog-

nizes every state's primary interest in its own preservation and perfection and which, in the absence of agreements, imposes on a state only legally imperfect obligations as far as the promotion of the welfare of others is concerned.

The fact that rules of natural law binding nations in conscience ¹¹² bind them only imperfectly from the legal point of view seems to lift those standards of moral perfection out of the legal sphere and into the sphere of ethics. But Wolff's theory still is based on the concept that natural law, including the necessary law of nations, is a legal order. Unlike Pufendorf, however, he does not believe that natural law alone can govern the relationships between states. According to him, there must be a positive law of nations just as there exists a positive law within a state: "the condition of men is such that in a state one cannot completely satisfy in all details the rigour of the law of nature, and for that reason there is need of positive laws, which do not differ altogether from the law of nature, nor observe it in all details." ¹¹³ Wolff realizes the difference between man as he actually exists and ideal man who is supposed exclusively to follow in his behavior the dictates of nature and reason. Positive law is to take account of men not as they ought to be, but as they are.¹¹⁴ The intercourse between states also must be regulated by positive rules which take actual human conditions into consideration and which to a certain extent depart from the necessary law of nations, since in the positive legal order "things which are illicit in themselves have to be, not indeed allowed, but endured, because they cannot be changed by human power." ¹¹⁵

Like Grotius, Wolff maintains that, by virtue of the positive, volitional, law of nations, war produces certain legal results regardless of the justice of its cause; it is "to be considered as just on either side," ¹¹⁶ and "what is rightly allowable for one belligerent in war is also allowable for the other." ¹¹⁷ Unlike natural law, the volitional law of nations does not impose on states the obligation to use one of the methods of peaceful settlement before going to war in a doubtful case.¹¹⁸

Wolff connects the concept of the volitional law of nations with the idea, already mentioned above, that all states have com-

bined in a supreme state (*civitas maxima*) of which they are members or citizens; its purpose is to promote the common good of the states by their combined powers.¹¹⁹ The volitional law of nations is the legal order of the supreme state.¹²⁰ This state has a particular character which distinguishes it from the individual states composing it. The individual states are supposed to have their origin in agreements. The supreme state arises from a "quasi-agreement;" according to Wolff, nature itself has combined the states of the world into this greater unit, and *their agreement can be assumed since they must consent to its existence if they know their own interests.* The *civitas maxima* is, therefore, a scientific fiction as Wolff explicitly admits.¹²¹ The process of lawmaking in the global state also has a fictitious character. Wolff declares that the supreme state, a body composed of free and equal bodies, has a kind of popular regime ("*civitas maxima status quidam popularis est*").¹²² In a state of this type he regards majority decision as the natural method of determining the will of the community as a whole.¹²³ But since "all the nations scattered throughout the whole world cannot assemble together," Wolff concludes that "that must be taken to be the will of all nations which they are bound to agree upon if following the leadership of nature they use right reason."¹²⁴ Wolff even imagines the existence of a ruler of the supreme state whose imaginary task is to formulate the positive, volitional, law of nations—that is, to define "by the right use of reason what nations ought to consider as law among themselves, although it does not conform in all respects to the natural law of nations, nor altogether differ from it."¹²⁵

In the absence of a real lawmaking procedure, it actually is the scholar who formulates the rules of the supposedly positive law of nations.¹²⁶ For this law obviously still is a kind of natural law, although adapted to human conditions and consequently of somewhat less dignity than the necessary law of nations. It is still a law of reason whose sphere of application extends as far as there are human beings endowed with the faculty of reasoning. Unlike Grotius' volitional law of nations it is, therefore, a universal law. The fictitious *civitas maxima* is a world state.

Wolff, of course, knew that in reality there was no world state.

Nor did he wish to suggest that there ought to be a real world state in the future. His theory of the *civitas maxima* simply expresses the idea that under existing conditions there are rules in the international sphere which constitute a legal order in the full meaning of the term as ordinarily used. If, as Pufendorf had maintained, natural law alone governs the relations between states, then there exists in the international domain a law which is higher in kind than positive municipal law but which is not law in the same sense as the latter. Positive municipal law, however, is law in the ordinary sense of the term. It appears in connection with a particular kind of organization—the state. By deriving the volitional law of nations from the concept of the supreme state, Wolff attempts to demonstrate the parallelism between that law and municipal law as far as the legal character and the relation of the law of nature are concerned.¹²⁷

Natural law is supposed to form a coherent system because all its rules are logically deduced from certain fundamental premises. The systematic character of municipal law depends on the existence of the state organization which makes it possible to create a more or less consistent body of general rules of behavior and to apply them more or less uniformly throughout the whole community. If the nature of the volitional law of nations is to be comparable to that of municipal law, there must be a system of general rules in the international sphere. The theory of the world state and of its legal order has the purpose of making the international community appear as governed by a set of such rules; they are supposed to form a systematic unit because they are derived from a common principle, the purpose of the universal state.

Like Pufendorf, Wolff maintains that rules laid down by states through actual consent, which do not form a coherent system, cannot be considered as the law of nations. From the volitional law, which “rests on the presumed consent of nations,” he distinguishes the stipulative and the customary law of nations; the former is based on express consent, the latter on tacit consent.¹²⁸ The rules created by consent, tacit as well as express, are binding only upon those states which have consented to be bound; they have no universal validity. Wolff, like Pufendorf, compares agree-

ments between states to contracts concluded between private citizens within a state;¹²⁹ the rules laid down in such contracts are to be distinguished from the general rules which give the contracts their legal character by determining the conditions of their validity and their legal effects. In Grotius' theory the volitional law of nations appeared as customary law binding only a limited number of states. Wolff criticizes this concept because Grotius identified the volitional with the customary law of nations and, as a result of this identification, he did not distinguish "good customs from bad."¹³⁰ In Wolff's theory the existence of a law of nations, different from the law of nature and comparable to municipal law, can be assumed only if there exists a set of rules applicable throughout the whole community, in the light of which the legal validity, the goodness or badness, of isolated agreements between some of the members of the community can be judged. The concept of the world state from which the principles of the volitional law of nations are supposed to be derived expresses the idea that there is such a set of general rules.

Since, however, the world state has a purely imaginary character and since, consequently, Wolff's volitional law is not really positive law but a law of reason, the parallel between the rules laid down in contracts of private citizens and those created by the consent of states cannot be complete. The contracts of citizens find their basis in a man-made, positive, legal order which is regularly enforceable through the state organization. Such a legal order can lay down rules according to which the equity of contracts is a condition of their validity. Within a state, "provision can be made by positive laws that one may not depart too far from equity."¹³¹ In the global community, states are supposed to be bound by the law of nature to observe equity in making treaties.¹³² But, according to Wolff, the treaties are to be considered valid regardless of equity, because the observance of rules concerning their contents cannot be guaranteed.¹³³ In the international sphere, in which the general rules—those of natural as well as of volitional law—are standards of reason, only rules applying to a limited number of states are actually created by human will. The law of reason is supposed to guide the will of the states

concerned, but compliance with that law depends upon the states' reasonableness and good will, just as it depends upon their reasonableness and good will to what extent the principles of natural law are observed in the process of creating positive municipal law. In spite of their limited scope of application, rules laid down by consent in the international community thus seem to correspond to the general laws of a state rather than to the provisions of private contracts of citizens, insofar as by human will legal rules are established which are not based on other positive rules. In this respect the creation of stipulative or customary law therefore appears to be comparable to legislation in the municipal sphere. Wolff, indeed, occasionally compares states creating customary international rules to the legislator making laws within a state.¹³⁴

There is a fundamental difference between the condition of the states as members of the fictitious world state and that of the citizens of a real state. The law of the supreme state, as well as that of the individual states, is supposed to result from an adaptation to existing conditions of the inflexible law of nature. In the case of the real states this adaptation implies the subjection of the individuals to a common government which restricts their natural liberty. Through its organization the state provides for security and order, even if its laws do not correspond exactly to the universal standards of justice. In the supreme state, however, which in reality is completely unorganized, the state of nature, the condition in which naturally free and equal persons live together, obviously is not eliminated. The principles of natural equality and liberty remain valid in that state. Characteristic of this situation is Wolff's explanation of the rule of the volitional law which attributes legal effects to war regardless of the justice of its cause. This explanation is derived from the principle of natural liberty. Since by virtue of this principle each of the belligerents must be allowed to follow its own opinion regarding the justice of the war's cause, the war, as far as certain legal results are concerned, must be considered as just on either side, although by the law of nature it cannot be just on both sides.¹³⁵ In the case of the volitional law of nations, the adaptation of the law of nature

to existing conditions means that states are permitted to do things which are not in agreement with the law of nature because in the state of nature, which continues to exist, they cannot be prevented from doing so. The volitional law of nations instead of restricting natural liberty, as does the positive law of the states, therefore rather increases its extent and leaves the states greater freedom of decision than the law of nature gives them.

This supposedly positive law consists of a set of general rules which it seems possible to deduce from the particular character of the legal community of states once the existence of such a legal community is assumed. That particular character is determined by the continued existence, in the international sphere, of the state of nature—that is, by the absence of a statelike organization—and, at the same time by the absence of that condition of moral perfection which would make it possible for the states to live together under the rule of pure natural law, which is the law originally applicable in the state of nature. Like natural law, the legal order of the community of states is a law of reason, and some of the fundamental principles of natural law, such as the principles of natural equality and liberty, remain valid in that community; but the volitional law is a law of reason adapted to the moral weakness of man and, therefore, a law of a less elevated character than the law of nature. Its inferior character with regard to natural law is supposed to make the volitional law of nations similar to municipal law. The fiction of the supreme state is meant to express that similarity. But since the world state is purely fictitious, the legal order evidently cannot be expected to create the same conditions of peace and security which prevail within a real state. The volitional law of nations, therefore, appears to be similar to Grotius' law of nations insofar as it shares with municipal law the inferior character of a law deviating from the law of nature, and with natural law the uncertainty of application.

Wolff did not believe that the future development of mankind would bring about a fundamental change in this situation. Such a change could have been expected as the result of progress leading to increased reasonableness throughout the world. Wolff declares that if the rules of the law of nature were strictly observed

by all states, the volitional law of nations would become unnecessary.¹³⁶ But he regards such a development as impossible. In the concluding sentence of the Preface to his treatise he expresses the hope that God "may bring it about that the times may come in which, if not all, at least very many rulers of nations may recognize what they owe to their own nation and to other nations." Wolff admits, however, that general progress in the direction of increased reasonableness is "more to be desired than expected."¹³⁷ Since, therefore, "it is not to be hoped that all nations will be what they ought to be," he concludes that "there will always be a place" for the volitional law.¹³⁸

Wolff regards as unchangeable the particular character of this law as a law binding upon free and equal states. Because of the principles of liberty and equality it is impossible that one state or a group of states should exercise authority over other states in the same manner that, within a state, certain individuals as agents of the community exercise authority over other individuals.¹³⁹ The transformation of the fictitious supreme state into a real world state is considered to be inconceivable.¹⁴⁰ The division of the world into free and equal states, therefore, appears to be a natural condition of mankind.¹⁴¹ The volitional law of nations, which is supposed to constitute the positive legal order of the global body, consequently cannot become a truly positive law: but it is to remain a law of reason, derived from the nature of the global community, although as a law adapted to the actual conditions of the world it is not identical with natural law.

4

THE POSITIVIST THEORY OF INTERNATIONAL LAW AS LAW CREATED BY SOVEREIGN CIVILIZED STATES

IDEAS like those which characterized Wolff's theory of the volitional law of nations influenced the development of the positivist doctrine of international law. The positivist theory was based on the idea expressed by Wolff that there existed in the international sphere a positive legal order, just as there were positive legal orders in the various national communities. The positivists tried to be more consistent than Wolff had been in the attempt to demonstrate the positive character of the law governing the international community. They were not able, however, completely to eliminate from their doctrine the natural-law elements which had been inherent in Wolff's theory of the volitional law of nations.

The following analysis of the positivist doctrine is based on the second edition of Oppenheim's treatise on *International Law*¹—which, published in 1912, represents a typical example of that doctrine in the phase of development which it had reached before the First World War and the creation of the League of Nations.

The positivists regarded as their task the systematic presentation of an international legal order which, as a positive law, existed independently of their personal ideas of natural and reasonable standards of behavior. Wolff's volitional law of nations had not been really positive law because its general rules did not have their origin in human will but were derived from the presumed consent of the members of the international community.

In the positivists' opinion, only rules created by the actual consent of states can be regarded as rules of international law. According to Oppenheim, the consent from which rules of international

law arise may be either express or tacit. "The sources of International Law are therefore twofold—namely: (1) *express* consent, which is given when states conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) *tacit* consent, which is given through States having adopted the custom of submitting to certain rules of international conduct. Treaties and custom are, therefore, exclusively the sources of the Law of Nations." ²

According to Oppenheim, the law which is created in the international sphere, by express or tacit consent, is distinguished from municipal law by the fact that "whereas Municipal Law is a law of a Sovereign over individuals subjected to his sway, the Law of Nations is a law not above, but between Sovereign States." ³ The subjects of international law normally possess sovereignty—that is, "supreme authority, an authority which is independent of any other earthly authority" and which includes "independence all round, within and without the borders of the country." ⁴ By virtue of their sovereignty the states are completely free in the conduct of their internal and external affairs except for the rules which by their consent they have bound themselves to observe in their relations with one another.

These rules are supposed to constitute a legal order just as municipal law is law in the strict sense of the term, in spite of the special characteristics which distinguish international from national law.⁵ But the rules of international law and those of municipal law, which are regarded as belonging to the same category of norms—the legal category—form different legal systems. The separation of the international sphere from the various legal spheres of the national communities becomes complete in the positivist theory, which strongly emphasizes this separation. The distinction between the legal order regulating the intercourse of states and the states' system of internal law had clearly appeared already in Wolff's theory. This theory, however, still rested on the idea that there existed a universal law of nature and reason in which all legal rules had their ultimate common basis, a law of mankind uniting all members of the human race and constituting

a general standard of justice. The positivists expressly reject these natural-law concepts.

According to Oppenheim, the idea that the law of nature guarantees to every individual the "so-called rights of mankind," which must be respected by all states, is incorrect.⁶ Such rights, conceivable in a world order based on natural law, cannot be derived from positive international law because "individuals cannot be subjects of that law." International law and municipal law have different sources and regulate different relations. Municipal law, created by national custom and by statutes enacted by the lawgiving authority, "regulates relations between the individuals under the sway of the respective State and the relations between this State and the respective individuals," while international law has its source in international custom and treaties and regulates the relations between states.⁷ Only the states can create rules of international law and they alone are subjects of the rights and duties arising from these rules; the law of nations is "not a law for individuals."⁸ A state may be bound by an international rule to confer certain rights or impose certain duties on individuals, but in this case rules have to be created through the lawmaking procedure of municipal law, and the rights and duties thus created have their legal basis in municipal, not in international, law. A state may, therefore, be compelled to bring its internal law into agreement with its international obligations; the fact that it fails to do so may constitute an international delinquency, but it does not affect the validity of the internal rules in question, for international law "lacks absolutely the power of altering or creating rules of Municipal Law."⁹

In this theory the law of the international sphere has entirely lost the character of a law higher in kind than the law of the political units composing the universal community. Because of the complete separation of international from national law, the former cannot even be regarded as being higher than the latter in the sense of a hierarchy of positive legal rules. As Oppenheim points out, international law is a law between, not above states—a separate legal order which sovereign states, internally governed by

their particular systems of municipal law, have established for the regulation of their relations with one another.

The positivists' rejection of a natural legal bond uniting all mankind has important consequences with regard to the area within which international law appears to be applicable. In the view of the positivists, the international legal community is a product of historical development¹⁰ and therefore not necessarily worldwide. According to Oppenheim, the community governed by positive international law is composed of a certain number of states which have reached similar levels of civilization.¹¹ The law of nations is supposed to have grown up among the old Christian states of Western Europe, which are the original members of the international community. Other civilized states which were capable and willing to observe the rules of the law of nations later were admitted into the circle of the family of nations through recognition by its members. In addition to the full members of the international community there are states which, because they are not completely civilized, are only "for some parts within the circle of the Family of Nations," but "remain for other parts outside."¹²

In Oppenheim's theory the law of nations "does not contain any rules concerning the intercourse with and treatment of such States as are outside that circle. . . . It is discretion, and not International Law, according to which the members of the Family of Nations deal with such States."¹³ Here the positivist theory differs from the doctrine developed by Wolff, who had assumed the existence of a world-wide law of nations. But that theory differs also from Grotius' concept, although Grotius had asserted that the rules of the volitional law of nations were not of universal validity. In his doctrine those rules were established within a global legal system which was supposed to apply to the states bound by particular rules of volitional law as well as to all other states. The positivists, however, conceive of a self-contained body of positive rules governing a limited community of states which constitutes the international legal community as such and outside of which legal relationships do not exist.

The conduct of civilized states, members of the family of na-

rions, toward peoples outside this family thus appears to be a matter of politics, not of law.¹⁴ In Oppenheim's opinion it is obvious, however, that the intercourse with and the treatment of uncivilized states "ought to be regulated by the principles of Christian morality."¹⁵ Moral principles generally "ought to apply to the intercourse of States as much as to the intercourse of individuals."¹⁶ The positivists therefore recognize the existence of norms which are of a higher type than positive law and which ought to be observed throughout the world. But in the positivist theory these norms, which "apply to conscience, and to conscience only,"¹⁷ have lost all legal significance. As far as international intercourse is concerned, the legal sphere is limited to the rules which have their origin in the consent of civilized states. Where this sphere ends, the domain of politics begins. Political action should be guided by moral principles, but the fact that these principles are frequently disregarded¹⁸ is legally irrelevant.

Thus, for instance, the question as to the causes of war seems to Oppenheim to be of importance for international ethics rather than for international law.¹⁹ War, whose purpose is to overpower the enemy and to impose on him such conditions of peace as the victor pleases, in the positivist's view is "a fact recognized, and with regard to many points regulated, but not established, by International Law."²⁰ That war is not established by law means that there exist no legal rules determining the conditions under which it may be undertaken. Among sovereign states war cannot always be avoided, and international law recognizes this fact.²¹ Like Grotius and Wolff in their theories of the volitional law of nations, the positivist assumes that war produces legal effects regardless of its cause; both parties are bound to comply with certain rules regarding its conduct. A special set of rules governs the relations between belligerents and neutrals. Neutrality is an attitude of impartiality toward the belligerents. Whether a state adopts this attitude or participates in the war appears to be again a matter of politics, not of law.²²

Positive international law as described by Oppenheim was supposed to have a firmer basis in reality than the imaginary law which the adherents of the natural-law doctrine had tried to deduce from

their concepts of nature and reason. The positivists were still confronted, however, with problems similar to those with which the writers had to deal who accepted the natural-law doctrine. The problem of the legal character of rules binding upon independent states, members of the unorganized international community, was even more difficult to solve for the positivists than it had been for those who maintained the idea that there existed a law which could be deduced directly from the nature of man and of human community life. It was under the influence of that idea that the concept of an international legal community had developed. Oppenheim attempts to free the theory of international law from the influence of the natural-law doctrine. But this attempt obviously is not entirely successful. The general character of his positive international law still is very similar to that of Wolff's volitional law of nations.

Like Wolff, Oppenheim conceives of international law as a system of rules. According to Oppenheim, international law is the name for a "body of customary and conventional rules;"²³ the term "body" clearly implies a number of elements regarded as forming a system.²⁴ In accordance with his idea that international law is a product of historical development, Oppenheim assumes that it has acquired its systematic character in the course of history. International law "began gradually to grow from the second half of the Middle Ages. But it owes its existence as a systematised body of rules to . . . Hugo Grotius, whose work '*De Jure Belli ac Pacis, libri III*' . . . became the foundation of all later development."²⁵ This development is supposed to have led to the gradual acceptance by the community of states of the rules laid down by Grotius, which through this acceptance became rules of international law.²⁶ Oppenheim thus tries to show that the dependence of the science of international law on the natural-law doctrine is but an historical fact characterizing an early phase of the growth of the law of nations, and that later this law acquired the character of a system of positive legal rules.

It seems indeed impossible to maintain that international law is similar to municipal law unless the former has a systematic character. The law of the national community does not consist of

isolated, unrelated rules. Municipal law ordinarily contains general rules, applicable throughout the whole community, and rules of a particular character, which derive their validity from the general rules and together with them form a more or less coherent body of norms concerning all matters which, in the conditions prevailing in the community at a certain time, require legal regulation. Wolff had attempted to prove that in the unorganized international community there was a system of volitional law, just as there were legal systems in the various states. Serious difficulties had, however, arisen in this connection. The rules of the stipulative and of the customary law of nations were the only norms that had their origin in human will and were, therefore, really volitional, positive law; their establishment seemed in some respects to correspond to the making of general rules in the national sphere. But Wolff, who considered their scope as necessarily limited, compared them to contracts which are concluded by private citizens in a state and which cannot be regarded as forming a legal order.

As far as rules established by express consent are concerned, Oppenheim tries to clarify the situation by distinguishing between two different types of treaties—lawmaking and ordinary treaties. This distinction has the purpose of demonstrating that several states together can act as legislators by laying down positive legal rules in the international sphere, just as each of them can legislate within the domain of its national law. According to Oppenheim, “such treaties only are a source of International Law as either stipulate new rules for future international conduct or confirm, define, or abolish existing customary or conventional rules. Such treaties must be called *law-making treaties*.”²⁷ Like ordinary treaties, the lawmaking treaties are supposed to bind exclusively the contracting parties. But unlike Wolff, Oppenheim does not think that international treaties necessarily are of less than universal validity. Lawmaking treaties, which are concluded by a few states only, of course create merely particular international law. But more important from the point of view of the systematic unity of the law of nations, which obviously requires the existence of general rules, are the treaties which contain *general*

international law, "because the majority of States including leading Powers, are parties to them."²⁸ According to Oppenheim, some of these lawmaking treaties have become of world-wide importance.²⁹ The significance attributed by Oppenheim to this type of agreement with regard to the development of a positive legal order is revealed in a remark made by the same author in his book on *The Future of International Law*.³⁰ Here he says that "a positive theory of international law was demanded by the fact that in the first quarter of the nineteenth century, with the Final Act of the Congress of Vienna, the quasi-legislative activity of international conventions asserted itself for the first time."³¹ At the time when Oppenheim wrote these words, however, agreements of the type which he had in mind covered only a relatively small number of isolated matters, particularly as far as the peaceful intercourse of states was concerned.³² If one considers the international legal order as described by Oppenheim in his treatise, it is impossible to assume that its systematic character rests on the rules laid down in those conventions.³³

This character seems to depend on customary law rather than on rules created by express agreement. In Oppenheim's opinion, customary law contains the general principles which establish order and unity in the international legal domain. He declares, for instance, that it is "a unanimously recognised customary rule of International Law that obligations which are at variance with universally recognised principles of International Law cannot be the object of a treaty." Treaties designed to establish such obligations are "null and void."³⁴ Oppenheim, moreover, observes that treaty law, whether particular or universal—that is, binding upon all members of the international community—generally derives its binding force from custom, which is "the original source of International Law."³⁵ "For the fact that treaties can stipulate rules of international conduct at all is based on the customary rule of the Law of Nations, that treaties are binding upon the contracting parties."³⁶ According to Oppenheim, "custom is at the background of all law, whether written or unwritten,"³⁷ and he tries to demonstrate that in this respect there is no difference between national and international law.³⁸ He finds the latter's ultimate basis

in "the common consent of the States that a body of legal rules shall regulate their intercourse with one another." ³⁹

In Oppenheim's own opinion, however, the question as to whether there exists an international legal order is a theoretical problem. Therefore, it is the scholar's task to demonstrate that custom, supposedly "at the background" of the law of the national community organized as a state, can create a legal order in the unorganized international community. A theoretical problem of this kind cannot possibly be solved by the states themselves, which, for some reason or other, may regard themselves as bound by certain rules of conduct. In this connection Oppenheim raises the question whether there really exists in the international sphere a community, which he considers to be an indispensable condition of the existence of a legal order. He answers this question in the following way: "Though the individual States are sovereign and independent of each other, though there is no international Government above the national ones, though there is no central political authority to which the different States are subjected, yet there is something mightier than all the powerful separating factors: namely, the common interests. And these interests and the necessary intercourse which serves these interests, unite the separate States into an indivisible community." ⁴⁰

This way of reasoning clearly is very similar to Wolff's arguments regarding the origin of the fictitious world state. The interests, which in Oppenheim's view establish the community of states, correspond to the interdependence of peoples, which in Wolff's theory naturally unites them in the global legal community. Once Wolff had assumed the existence of the supreme state, it seemed possible to him to deduce from the concept of that community the rules which the states were bound to observe and upon which they were supposed to have agreed, because without these rules a legally regulated intercourse between them seemed impossible. Although Oppenheim tries to show that all norms of international law have their origin in the actual consent of states, his method of formulating the general rules of the law of nations is not essentially different from that adopted by Wolff. Examining the "cause of the existence" of the rule that treaties are binding,

Oppenheim declares: "Religious and moral reasons require such a rule quite as much as the interest of the States, for no law could exist between nations if such rule did not exist."⁴¹ The states obviously were not really free to adopt or not adopt that rule if there existed an international legal order. The supposedly customary norm in fact is deduced from the scholar's assumption of the existence of such a legal order in a community of sovereign states, which can regulate their mutual intercourse only through treaties. It seems to follow from this assumption that there must be a rule of international law from which treaties concluded by sovereign states derive their binding force.

Oppenheim uses the same method with regard to most of the basic principles which are supposed to determine the general legal conditions of the international community as a whole and to give the legal order of this community its systematic unity and coherence. Although described as rules of customary law, these principles in fact rest on the presumed rather than on the actual consent of states. They obviously are formed by logical deduction from the nature of the legal order supposed to govern the intercourse of sovereign states. The positivist tries to determine the nature of this legal order in accordance not with an ideal situation but with existing conditions. Thus the character of Oppenheim's general principles of international law is similar to that of Wolff's volitional law of nations, which was a law of reason regulating the relations between naturally free and equal persons but was adapted to existing conditions under which these persons could not be compelled to observe the highest standards of conduct.

The most important concept which Oppenheim deduces from the nature of international law is that of the international personality. He says himself that "the conception of International Persons is derived from the conception of the Law of Nations."⁴² In accordance with this latter conception, sovereign states exclusively are international persons.⁴³ The similarity between the positivists' concept of sovereignty and Pufendorf's and Wolff's concept of national liberty is obvious. A state which enters into the family of nations, according to Oppenheim, retains "the natural liberty of action" which is "due to it in consequence of its

sovereignty.”⁴⁴ But this liberty must find its limit in that of the other members of the international community. Oppenheim declares that “a legally regulated intercourse between Sovereign States is only possible under the condition that a certain liberty of action is granted to every State, and that, on the other hand, every State consents to a certain restriction of action in the interest of the liberty of action granted to every other State.”⁴⁵ In order to be able to consider this condition fulfilled, he assumes that the states recognize in one another certain qualities from which certain rights and duties arise and which together constitute the international personality of a state.⁴⁶ These qualities include the different elements of sovereignty, namely, independence and territorial and personal supremacy, as well as dignity and equality.

The principle of the legal equality of states had been developed by the natural-law school; in the theories of Pufendorf and his followers it appeared to be the natural consequence of the assumption that the members of the international community were free persons living together in the state of nature. According to Oppenheim, the equality of states “is a consequence of their sovereignty and of the fact that the Law of Nations is a law between, not above, the States.”⁴⁷ This statement makes it clear that, like the adherents of the natural-law doctrine, Oppenheim arrives at that concept by deducing it from the nature of the international community and of its law. Here as well as in the case of the other qualities constituting the international personality, the states’ consent appears to be the merely presumed recognition of a situation which cannot be different if there is to be an international legal order.

International law under which a state is responsible for violations of another state’s personality⁴⁸ is supposed to protect that personality and therefore to forbid intervention—that is, “interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things.”⁴⁹ There are, however, exceptions to the protection of the qualities which constitute the international personality of states. For instance, violations of the personality of other states may, under certain conditions, be excusable when they are committed by a state in

self-preservation.⁵⁰ Oppenheim declares that the exceptions to the general principle of the inviolability of the international personality "are likewise characteristic of the position of the States within the Family of Nations."⁵¹ He obviously is of the opinion that the rules regarding the international personality and its protection and the rules concerning the exceptions to that protection together form the set of general norms which gives the family of nations the character of a legally ordered community.⁵²

In Oppenheim's theory of international law the rules which allow or excuse the use of force by one state against another are of particular importance from the point of view of law enforcement. Oppenheim defines law as "a body of rules for human conduct within a community which, by common consent of this community, shall be enforced by external power."⁵³ The possibility of law enforcement through external power, therefore, appears to be a condition of the legal character of the rules governing the intercourse between states. Oppenheim assumes that this condition is fulfilled: "in the Law of Nations, the States have to take the law into their own hands. Self-help and intervention on the part of other States which sympathise with the wronged one are the means by which the rules of the Law of Nations can be and actually are enforced."⁵⁴

In positive international law various methods are supposed to exist which states can use for the enforcement of their rights; in a particular case, a state may have a choice between several of them. When, for instance, one of the subjects of a state has been wronged abroad in his person or property, that state, according to Oppenheim, can "exercise retortion and reprisals for the purpose of making the other State comply with its demands. It can, further, exercise intervention, and it can even go to war when necessary."⁵⁵ Since, however, positive international law does not distinguish between just and unjust causes of war, a state may go to war whenever it pleases, whether or not it claims that one of its rights has been violated by another state. The determination by international law of the conditions under which less harmful means of compulsion may be justified then appears to be completely futile. Instead of choosing any of these methods, a state can always go to war without violating a rule of international

law, and in this case it is allowed even entirely to eliminate its enemy's personality through subjugation after conquest.⁵⁶ The protection which international law is supposed to provide for the international personality of states thus obviously becomes illusory. However well-defined the other exceptions to the principle of the international personality's protection may be,⁵⁷ the exceptions derived from the positivist concept of war clearly invalidate the principle. International law mainly sanctions every state's freedom of political action, and it seems to do that to such a degree that even those fundamental rules of the international legal order which are designed to define every state's sphere of liberty with regard to the spheres of liberty of the other states become mean-

In the field of contractual obligations, the states' freedom of action finds expression in the principle formulated by Oppenheim that "all treaties are concluded under the tacit condition *rebus sic stantibus*." ⁵⁸ Oppenheim declares that "when, for example, the existence or the necessary development of a State stands in unavoidable conflict with such State's treaty obligations, the latter must give way, for self-preservation and development in accordance with the growth and the necessary requirements of the nation are the primary duties of every State. No State would consent to any such treaty as would hinder it in the fulfilment of these primary duties." ⁵⁹ Therefore, the "exceptional condition" *rebus sic stantibus* appears to be "as necessary for International Law and international intercourse as the very rule *pacta sunt servanda*." ⁶⁰ As in the case of the protection of the international personality, positive international law here seems to allow the states to disregard a fundamental rule which is supposed to bind them whenever they consider their particular interests to be incompatible with its observance. Under these conditions, which Oppenheim considers to be the inevitable result of the character of the international community as a community of sovereign states, the law of nations can hardly be regarded as a coherent legal system.

Oppenheim of course does not see the situation in this light. He is convinced that he describes a legal system which in principle guarantees the inviolability of the international personality and

the binding force of international agreements. While in accordance with his positivist viewpoint his description of the law of nations is supposed to be based on the actual practice of states, it is meant to be a description of a body of legal rules and not merely of the manner in which states generally behave in their mutual relations. It therefore seems to be possible and necessary to distinguish legal from political practice. If a "frequently adopted international conduct of States is considered legally necessary or legally right, the rule, which may be abstracted from such conduct, is a rule of customary International Law." ⁶¹ Other state practice then seems to have a merely political character. This character, however, does not necessarily make such a practice a disturbing influence in the life of the international community. On the contrary, Oppenheim assumes that some political factors have the greatest importance for the development and maintenance of the international legal order. One of these political factors is the leadership of the Great Powers. Oppenheim maintains that the special position which these Powers occupy in the international community is "by no means derived from a legal basis or rule." ⁶² "The Great Powers are *de facto*, by the smaller States, recognised as political leaders, but this recognition does not involve recognition of legal superiority." ⁶³ Legally all states are supposed to be equal. One of the consequences of their legal equality is the rule that no state can be bound by a resolution to which it has not given its consent. ⁶⁴ In practice, according to Oppenheim, "all arrangements made by the body of the Great Powers naturally gain the consent of the minor States." ⁶⁵ Since, however, it is not a legal rule but simply "powerful example" which makes the smaller states consent to the arrangements of the Great Powers, ⁶⁶ the legal principle of the equality of states seems to Oppenheim to be left intact. But, according to Oppenheim, the political leadership of the Great Powers does not appear to be incompatible with international law; it even favors that law's development. The influence of the Great Powers facilitates the reaching of decisions to which otherwise it would be difficult to obtain the consent of all concerned in an unorganized community governed by the rule of legal equality. Thus, accord-

ing to Oppenheim, "every progress of the Law of Nations during the past is the result of their [the Great Powers'] political hegemony." ⁶⁷

Oppenheim supposes that the existence of several Great Powers reduces the risk of an arbitrary use of force in the international community. He declares, for instance, that "too great is the natural jealousy between the Great Powers, for an abuse of intervention on the part of one powerful State without calling other States into the field." ⁶⁸ Thus, the natural antagonism between the most powerful states seems to guarantee the observance of the principle of nonintervention. Oppenheim generally expresses the opinion that "if the Powers cannot keep one another in check, no rules of law will have any force, since an over-powerful State will naturally try to act according to discretion and disobey the law." ⁶⁹ Oppenheim, therefore, arrives at the same conclusion which Wolff had reached—namely, that the maintenance of the international legal order depends upon the existence of an equilibrium, a balance of power.⁷⁰ The balance of power seems to compel the states to respect each other's personality and thus seems to preserve what is supposed to be the normal condition of the international legal community. Oppenheim considers it "necessary to emphasise that the principle of the balance of power is not a legal principle and therefore not one of International Law." ⁷¹ It is a political principle, obviously based on the antagonism of the states' political interests; but this political principle appears to be "indispensable to the existence of International Law in its present condition." ⁷²

Oppenheim considers the condition of the international law of his time to be that of a legal order in an early phase of development.⁷³ He expects that in the future the law of nations will become more perfect. But in his opinion there exist certain limits to that law's possible development. He declares that "it is inevitable that the Law of Nations must be a weaker law than Municipal Law, as there is not and cannot be an international Government above the national ones which could enforce the rules of International Law in the same way as a national Government enforces the rules of its Municipal Law." ⁷⁴ The weakness which charac-

terizes international law here appears to be the result of an unalterable condition. *Only a superstate comprising all civilized peoples would eliminate that weakness; such a superstate not only does not exist, however, but it is clearly assumed that it cannot exist in the future.* The theory of positive international law, of course, recognizes the possibility that a greater state may come into existence where formerly there had been several smaller states. For instance, as a result of war a state may annex the whole territory of the conquered enemy. Several states may voluntarily give up their independence and unite in a greater political body. Oppenheim obviously assumes, however, that the development of the international community cannot lead to the establishment of a single state comprising the whole civilized world, just as Wolff considered the transformation of the fictitious *civitas maxima* in to a real world state to be inconceivable. Thus, in the positivist theory of international law the international legal community appears to have a natural unalterable structure, although this theory assumes that the international community and its law have not been established directly by nature but have been created by states in the course of history. It has been shown that actually the positivists derive the fundamental rules of international law from what they consider to be the natural condition of the international legal community. The concepts of positivist writers regarding that condition differ in details, and from these differences of opinion there arise numerous controversies concerning the basic principles of international law. But it is always the scholar who formulates these principles which, once a certain concept of the nature of the international legal community is adopted, appear to be necessary elements of the international legal order. In this sense the supposedly positive international law still is a law of nature and reason.

The positivists' views regarding the nature of the international community are, however, quite different from the ideas originally developed by the natural-law school. The adherents of this school had assumed that the members of the human race were united in a universal community governed by a universal law. This law, higher in kind than the law originating in the political communi-

ties into which the world is divided, was considered to constitute a standard of justice and reason with regard to the internal affairs of the states as well as to their mutual intercourse. The standard of reason and justice, to be observed likewise by the powerful and the weak, was supposed to be independent of political conditions. In the positivists' opinion, on the other hand, the international community was a community of sovereign states; individuals were completely excluded from it. The positivists assumed that the law governing that community was law in the same sense as the internal legal order of a state, although it appeared to be essentially a weaker law than municipal law. The rules of the law of nations were supposed to be derived from state practice, which was mainly characterized by the states' tendency to act freely in accordance with their political interests. The very existence of international law as a legal order seemed to depend on certain political conditions, especially on certain power combinations.

In spite of all differences, the positivist theory of international law had one fundamental assumption in common with the natural-law school—the assumption that there could be a law outside the state and that there actually was a legal order binding upon the states themselves as far as their relations with one another were concerned. The natural-law idea originally had made it possible to conceive of such a legal order. Through the positivist theory of international law this concept was maintained at a time when the idea of natural law no longer was generally accepted in legal science. This fact is of fundamental importance with regard to the development of the modern pattern of thought concerning world organization. For if it had not seemed possible to assume that there existed, or at least could exist, a legal order binding upon independent states, one could not have thought of maintaining international law and order through an organization like the League of Nations, which was an association of independent states and therefore did not alter essentially the existing political structure of the world.

The positivist theory of international law alone evidently does not account, however, for the growth of the League of Nations

concept. It is impossible to find in positive international law itself a basis for the hopes, inherent in the concept, that the general condition of the international community could be improved materially through an agreement among sovereign states. In order fully to explain the growth of the League concept, one has to examine certain theoretical ideas which, developed outside the science of international law, preserved the natural-law school's original views concerning the bond uniting the peoples of the world. There appeared to exist reasonable standards of behavior directly resulting from the nature of man and, therefore, common to all members of the human race, the observance of which seemed to guarantee the maintenance of order and security in a world divided into independent states. The ideas to be considered in this connection, however, did not simply keep alive concepts developed by the natural-law school. The adherents of that school had not expected that at any future time order in the international sphere would actually be preserved through general observance of the standards of nature and reason. Now it seemed to become possible to regard the ideal condition, which in the natural-law doctrine had had a purely theoretical character, as a goal which eventually could be reached in the course of history. The natural way to reach this goal appeared to be the establishment of a world organization which would help the states to conduct their affairs in a reasonable manner and in accordance with the common good of the global community. The world organization was not to be a world state, which appeared to be neither necessary for the maintenance of universal order and security nor to constitute a desirable solution of the international problem. It now seemed possible to achieve what the Popes had attempted to do in the late Middle Ages—namely, effectively to preserve order and harmony among various political bodies through an organization of a type different from that which existed in the bodies of which the larger community was composed.

PART TWO

**THE CONCEPT OF THE COMMUNITY OF
MANKIND, THE THEORY OF THE
NATURAL INTERESTS OF MEN, AND THE
BELIEF IN PROGRESS**

THE DOCTRINE OF UNIVERSAL REASONABLE STANDARDS OF GOVERNMENT

THE DEVELOPMENT of the modern concept of the essential unity of mankind is closely connected with the rise of the idea that there exist universal reasonable standards with regard to the government of the states into which the world is divided, standards which especially require the citizens' participation in the conduct of the affairs of the state and the respect by the state of a certain sphere of individual liberty. Of the greatest importance with regard to the rise of this idea is the theory which John Locke developed in the second of his *Two Treatises of Government*.¹ The basic concept of this theory is similar to Pufendorf's assumption that the individuals originally living as free and equal persons under the exclusive rule of the law of nature had combined in states, the primary purpose of which was to secure the safe exercise of natural law. Locke, however, arrived at new conclusions concerning the only reasonable principles of government and the natural limits of the state's authority, and these conclusions decisively influenced later thought on these subjects.

Locke's basic idea is that men are by nature all free, equal, and independent.² As long as they are not united in states they live in a state of nature which is a condition of equal liberty. But, although the state of nature is a state of liberty, it is not one of licence. "The state of nature has a law of nature to govern it which obliges everyone; and reason, which is that law, teaches all mankind who will but consult it that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions."³ The state of nature is, however, full of dangers. Therefore men, by common consent, unite into states and put themselves under governments.⁴ When they take this step, men

give up as much of their natural freedom as the community requires for the fulfillment of its ends. But the purpose of every one of them in becoming a citizen of a state is to preserve better than was possible in the state of nature his life, liberty and property—that is, those things which under natural law he was entitled to enjoy. Locke regards it as inconceivable that human beings would abandon the state of nature and subject themselves to a common authority on any other condition, “for no rational creature can be supposed to change his condition with an intention to be worse.”⁵

The purpose for which men, by their consent, subject themselves to a state determines the limits of the state's authority and especially of its legislative power.⁶ Laws, “not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court, and the countryman at plough,”⁷ have to conform to the law of nature⁸ which prescribes the respect of the life, liberty, and property of the members of the human race. The purpose of the state, however, is not only to be considered as far as the contents of its laws are concerned. It is of greatest importance for the development of modern ideas of state government that Locke deduced also from the ends for which states are established some definite conclusions concerning the type of government adapted to these ends. In his opinion absolute rulership is excluded as incompatible with the objectives of a state as conceived by reasonable human beings. An absolute ruler who “has the liberty to be judge in his own case, and may do to all his subjects whatever he pleases, without the least liberty to any one to question or control those who execute his pleasure,” and who, “in whatsoever he doth, whether led by reason, mistake, or passion, must be submitted to,”⁹ is in fact with respect to his subjects in the state of nature where men decide upon their own rights and duties. For the subject the situation is even worse than the state of nature since he lost the liberty to judge his own rights and to defend them, and “so is exposed to all the misery and inconveniences that a man can fear from one who, being in the unrestrained state of nature, is yet corrupted with flattery and armed with power.”¹⁰ Absolute monarchy is therefore “in-

consistent with civil society, and so can be no form of civil government at all.”¹¹ Such government requires the separation of the legislative and executive powers.¹² The ideal type of legislative agency is described by Locke in the following way: “in well-ordered commonwealths, where the good of the whole is so considered as it ought, the legislative power is put into the hands of divers persons who, duly assembled, have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made, which is a new and near tie upon them to take care that they make them for the public good.”¹³

According to Locke, the legislative power is the highest of the “Powers of the Commonwealth.”¹⁴ All these powers, however, are fiduciary powers “to act for certain ends”; those who exercise them are merely trustees of the people. In this sense the latter always hold the supreme power. When those to whom governmental powers are entrusted act arbitrarily, “the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.”¹⁵ That means that the people have a right of rebellion against those “who invade this fundamental, sacred, and unalterable law of self-preservation for which they [the people] entered into society.”¹⁶

Locke maintains that those who use governmental powers in a way inconsistent with their position as trustees create a state of war between themselves and the people; they act as unjust aggressors.¹⁷ When the government of a state by abuse of its authority has forfeited the power entrusted to it, the community becomes actually unorganized; resistance against the government and its removal are then legitimate, just as in the unorganized community of states according to natural law it is lawful to use force for the defense of one's rights. Rebellion thus seems to belong to the same category as war, which natural law permits under certain conditions when there is no common authority to decide a dispute and every one concerned has to judge the case according to his own conscience.

The concept of the right of rebellion is the ultimate conse-

quence of Locke's idea that, by becoming citizens of a state, men do not lose entirely their contact with the sphere of the law of mankind, the universal law of nature. When they unite in a state, men cannot possibly give up completely the favorable conditions which they were entitled to enjoy in the state of nature, in which they had lived together under the rule of a law of reason common to all members of the human race; ¹⁸ particularly they cannot renounce the claim to the preservation of life, liberty, and property. To some extent, therefore, men's natural legal condition seems to remain unaltered and unalterable by their subjection to a common authority. That condition, which is incompatible with absolute rulership, must be respected by every government as an insuperable limit of its power. When that obligation is disregarded, the universal law allows the people to remove the government by force.

Rebellion may affect only a part of a state and result in the independence of that part. The outstanding historical example of this kind of rebellion is the revolt of the American colonies. This event is here of special importance because of the influence exercised by Locke's theory of government on the thinking of that period, an influence which appears clearly in the text of the Declaration of Independence. When that Declaration was adopted, it had become a self-evident truth that all men are created equal and that they are endowed by their Creator with certain unalienable rights, among which are life, liberty and the pursuit of happiness, and that governments, deriving their just powers from the consent of the governed, are established to secure these rights. The consequences of the fact that a form of government "becomes destructive of these ends" are developed in the Declaration of Independence in accordance with Locke's theory. Having reached the conclusion that the king's attempt to establish an absolute tyranny makes separation from Great Britain necessary, the people of the colonies feel that "a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation." They address themselves to mankind as to the universal body united by that law on which they base their right to secede. As the result of the rebellion undertaken

to safeguard their natural rights, the people of the colonies emerge in the international sphere in which free and equal political bodies coexist under the rule of natural law; they "assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them."

The higher law which determines the reasonable order of a state and to which a state's subjects can appeal when their natural rights are disregarded by the Government here appears to be the same law from which states derive their status of liberty and equality.¹⁹ The doctrine underlying the Declaration of Independence presupposes the division of the world into political bodies that are regarded as bound by the universal law of nature in the conduct of their internal affairs as well as in their mutual intercourse, but which are not subject to a common authority.

In a world state which would cover the earth with a system of global positive law, revolution and secession are of course conceivable if the universal government becomes oppressive. But if that state is an effective organization, based on the combined forces of all the peoples of the earth, the chances of an attempt made by a part of the world's population to secede from the whole would be necessarily small. A general revolution against a firmly established world government may likewise appear difficult. At any rate the situation created by a universal state would be quite different from that which exists when there are several independent states, when the power of each individual state is limited by the power of the others, and when the appeal of an oppressed people to the common bond of humanity may have the effect of obtaining support from other parts of mankind not bound to obey the oppressive government.²⁰

On the basis of considerations of this kind it was actually often maintained that the existing structure of the world, the absence of a world state, constituted a guarantee of the freedom of individuals and peoples. A passage in Gibbon's *Decline and Fall of the Roman Empire*, written in the same period in which the American Revolution took place, clearly illustrates this manner of thinking. Comparing the Roman world empire to the conditions existing in his time, Gibbon says:

The division of Europe into a number of independent states, connected, however, with each other, by the general resemblance of religion, language, and manners, is productive of the most beneficial consequences to the liberty of mankind. A modern tyrant, who should find no resistance either in his own breast, or in his people, would soon experience a gentle restraint from the example of his equals, the dread of present censure, the advice of his allies, and the apprehension of his enemies. The object of his displeasure, escaping from the narrow limits of his dominions, would easily obtain, in a happier climate, a secure refuge, a new fortune adequate to his merit, the freedom of complaint, and perhaps the means of revenge. But the empire of the Romans filled the world, and when that empire fell into the hands of a single person, the world became a safe and dreary prison for his enemies. . . . To resist was fatal, and it was impossible to fly.²¹

The existence of independent states, united only through the observance of certain common standards, here appears clearly as a guarantee of the liberty not only of whole peoples, but also of individuals. Single persons who have to fear their rulers have an opportunity to save themselves by leaving their countries; a world state would eliminate this opportunity. The question of asylum became particularly important when the struggle against absolute rulership and for greater political liberty and a reasonable type of government became more general. The countries more advanced on the road to freedom, then, were the natural places of refuge for those who had been unsuccessful in their attempts to obtain greater freedom for the peoples of their respective states. Thus, the French constitution of 1793 granted asylum to foreigners exiled from their countries for the cause of liberty.²² In the course of the nineteenth century the idea that foreigners who had been involved in political activities against their governments should be given refuge became generally accepted. This idea found expression in the principle of nonextradition of political criminals, which was embodied in numerous national statutes and international treaties. In his treatise on international law, Oppenheim, whose positivist theory has been analyzed above, raised the question as to whether this principle was justified or not. According to him, political crimes "are in many cases a consequence of oppression on the part of the respective Governments"; they "are comparatively infrequent in free countries, where there is indi-

vidual liberty, where the nation governs itself, and where, therefore, there are plenty of legal ways to bring grievances before the authorities." ²³ Oppenheim then reached the following conclusion: "A free country can never agree to surrender foreigners to their prosecuting home State for deeds done in the interest of the same freedom and liberty which the subjects of such free country enjoy. For individual liberty and self-government of nations are demanded by modern civilisation, and their gradual realisation over the whole globe is conducive to the welfare of the human race." ²⁴

Thus Oppenheim, who expressly rejected the concept of a law of mankind concerned with individuals as well as with states, recognized a bond uniting the individual members of the human race who either enjoyed, or struggled for, political liberty within their respective states and who were all equally interested in the existence of free governments everywhere. The ideas here expressed by Oppenheim are typical of a general pattern of progressive political thought which arose in the course of the nineteenth century. This pattern of thought comprised various ideas connected with the general concepts of democracy and liberalism—the ideas of popular sovereignty, of representative government, of separation of governmental powers, of legal control of governmental acts, and of individual liberty to be safeguarded and respected by the state. The different elements were not always easy to reconcile with one another. There was especially a certain antagonism between the general concepts of democracy and liberalism, between equality and liberty. Generally, however, at the end of the nineteenth century political thinking was characterized by a blend of liberal-democratic ideas which were regarded as indicating reasonable principles of government. These principles appeared to be applied in a number of states which were the most advanced in civilization, and they seemed to be destined, with the progressive civilization of mankind, to find the universal application which their reasonable character was supposed to require.

The nineteenth-century pattern of liberal-democratic thought arose on the foundations laid in the preceding centuries by natural-

*law theories, among which Locke's doctrine was of particular importance. The liberal concept of a sphere of individual liberty to be respected by the state, for instance, had its basis in the doctrine of the natural unalienable rights of the individual. This doctrine found expression in the bills of rights attached to, or incorporated in, the first modern constitutions, adopted in America and in France in the last part of the eighteenth century. Following these examples, many countries later inserted such bills of rights in their constitutions. But while the liberal-democratic concept developed on the basis of natural-law theories, the natural-law doctrine itself no longer was generally recognized as valid. The positivist theory of international law, of course, was not an isolated phenomenon; it followed the general trend of nineteenth-century jurisprudence toward positivism—that is, toward a doctrine which denied the existence of a law directly deducible from the nature of man as well as the validity of such concepts as those of a state of nature and of a social contract. Nevertheless, in spite of the rejection by legal theory of the natural-law doctrine and its fundamental assumptions, nineteenth-century thought regarding reasonable principles of government continued to be characterized by ideas which originally were derived from these assumptions.*²⁵

The idea that there exists a law higher in kind than the ordinary law of a state appeared in a peculiar combination with legal positivism in connection with the written constitutions which in many countries contained the fundamental principles of government. The clauses of a constitution were regarded as part of the written positive law of the state. As fundamental rules they were, however, considered to be distinguished by particular dignity. The superiority of the constitutional provisions with regard to ordinary law, which was to be created in accordance with them, was expressed in the fact that their amendment generally was more difficult than the modification of ordinary statutes. Thus, there appeared within the province of positive law itself a distinction between superior legal norms and the common type of legal rules, a distinction which historically goes back to the distinction between natural and positive law, since the purpose of

the first modern constitutions was to determine the organization of the state and the extent of its authority in accordance with a universal law of nature and reason.

Especially significant in this connection are the concepts of constitutional government and of the rule of law as applied in the United States. In this country constitutional government is characterized by the principle of judicial review; by virtue of this principle, law courts are authorized not only to pronounce upon the legal validity of executive and administrative acts but also to judge the compatibility of statutes with constitutional provisions. The fact that these provisions are enforceable by the courts makes them similar to other positive legal rules, while at the same time they retain their character of special dignity. In his study on *The Revival of Natural Law Concepts*,²⁶ C. G. Haines has demonstrated to what extent the courts of this country in the exercise of the power of judicial review used ideas derived from the theory of natural law and especially the concept of natural rights. It was particularly in their broad interpretation of the phrase "due process of law" that in the last part of the nineteenth century the courts found an opportunity to apply such ideas and to base their decisions on a concept of general limitations on the legislative power, which were held to be implied in a system of government established for the maintenance of individual liberty.

This situation is interesting because it discloses the revival, or rather survival, of natural-law ideas in connection with the internal law of a national community. But the concept and practice of constitutional government are important also because of the influence which they exercised on the formation of modern thought concerning the international legal community. Where there was constitutional government, and especially where learned and impartial judges were authorized definitely to state what the law was within the community, there appeared to be, as Woodrow Wilson expressed it, "a law set above government and to which it must conform."²⁷ If there were a law above the government of an individual national community—that is, a law binding that state considered as a separate independent unit—then it seemed possible to assume that the state could also be bound by

legal rules which all peoples had to recognize as valid because their observance was a condition of orderly relations between them. The rule of law even seemed to be complete only when the state was subject to law also insofar as its intercourse with other states was concerned. In an article published in 1910, the Swiss jurist, Max Huber,²⁸ pointed out this connection between the rise of regimes providing for the legal limitation and control of governmental actions on the one hand, and modern ideas regarding the possibility and desirability of a legal order regulating the intercourse between independent states on the other. In particular he found in the fact that the rule of law appeared to be most firmly established in the United States one of the causes of the existence, in this country, of a strong and widespread "pacifist idealism" which favored the extension of the rule of law to the international sphere and especially the judicial settlement of disputes arising from diverging interpretations of the law of nations.

Thus, the liberal-democratic concept contributed to the maintenance of the idea that there existed a legal community of independent states. Moreover, the idea that that concept constituted a reasonable standard of government which eventually would be observed everywhere in the world strengthened the belief in the solidarity of mankind, all the members of which, according to that universal standard, appeared to be entitled to participate in the government of their respective states and to enjoy a certain sphere of individual liberty. It was this solidarity to which Oppenheim referred in the passage quoted above, where he attempted to justify the principle of nonextradition of political criminals. It seemed to imply an interest of all men not only in the manner in which they were governed themselves but also in the regimes of other people.²⁹

6

THE DOCTRINE OF THE NATURAL INTERESTS OF MEN

OPPENHEIM considered the gradual universal realization of individual liberty and self-government to be conducive to the welfare of the human race. Long before Oppenheim's time the idea had been expressed that the regime under which individuals lived in a particular state was important not only for these individuals themselves but for all mankind. This idea was based on the assumption that a relationship existed between the principles of government adopted by the various states and the possibility of maintaining peace between them. In his essay on *Perpetual Peace*, published in 1795, Kant enumerates the conditions of permanent peace in the six "preliminary" and three "definitive" articles of a draft treaty, and in the first definitive article he lays down the rule that the constitution should be republican in every state. Kant regards republicanism, in contradistinction to despotism, as characterized by the separation of the executive from the legislative power and by representative government.¹ Under a republican constitution war cannot be waged without the consent of the citizens. A constitution of this type is supposed to be the only reasonable one and the only one that can lead to international peace.

The idea that a certain type of government is a condition and guarantee of peace has become one of the essential elements of the modern pattern of thought regarding the possibility of maintaining law and order in the international sphere. Kant's essay on *Perpetual Peace* combines various ideas which in this particular combination have contributed to the growth of that pattern of thought.

The second definitive article of Kant's draft treaty deals with the problem of world organization. It provides that the law of na-

tions shall rest on a confederation of free states. In his commentary to this clause, Kant declares that reason prescribes the maintenance of peace and that the establishment of a world state, of a *civitas gentium*, is the only reasonable method of reaching this goal. This method corresponds to that adopted by the individuals who abandoned the freedom which they possessed in the state of nature and united in states in order to enjoy a peaceful common life. But according to Kant the world state is excluded as a solution of the problem of international war because the states are absolutely opposed to it. Under these circumstances the "positive idea of a world republic" is to be replaced by the "negative substitute" of a league created by an international treaty for the purpose of preventing war and maintaining the freedom of the confederated states without their subjection to a common authority.

This, however, is not the only passage of his essay in which Kant deals with the question of a world state. In the first "Addendum" to the definitive articles for perpetual peace, he states that according to reason the existence of many independent states is preferable to their fusion through an overwhelming power which finally would establish a universal monarchy. According to him, such monarchy would constitute a "graveyard of freedom"; it would impose on the world a "soulless despotism" and would finally disintegrate because it would be too big for effective government.

Here reason is said to be opposed to the idea of a world government. It must be observed that Kant speaks in this passage of a world state resulting from the conquest of the world by one powerful state, while in the passage referred to earlier he considers a world republic—that is, a world state entered into freely by the various states and organized in such a way as to exclude the despotism of a global empire. Kant is, of course, aware of the part played by conquest in shaping the boundaries of the existing states, which nevertheless he expects eventually to adopt republican constitutions. He obviously does not consider it possible, however, that a world state based on conquest would ever abandon the despotic form of government and transform itself into a world

republic. It is its origin, not its state character, therefore, which seems to exclude the world empire as a reasonable solution to the problem of universal peace.

Some of the arguments which Kant uses in connection with the world empire resulting from conquest, however, seem also to apply to the world republic. The difficulty of governing a state covering the whole earth evidently would be the same in either case. Moreover, Kant asserts that nature itself prevents the fusion of the states into a universal empire by keeping the peoples apart through the differences of language and religion. The division of the world into states thus seems to be the only condition that is in agreement with nature. This condition, therefore, is to be preserved against any attempt made by a single power to establish its supremacy over the world. It may be observed in this connection that history, which recorded the aspirations of European great powers to a hegemonial position, seemed to demonstrate the actual danger of world domination by a single state; while the voluntary union of all states under a universal government was practically excluded by the states' unwillingness to give up their freedom. But this unwillingness appears to correspond to nature's intentions. If nature wants to keep the peoples of the world separated, then it is opposed to the world republic as well as to the world empire. The latter, in Kant's opinion, would result in the "weakening of all forces." To this situation he opposes an ideal condition where peace is preserved through a harmonious interplay of competing forces. It is expected to result from growing civilization and the gradually increasing agreement of men on principles. This ideal condition in which peace and order are maintained among free peoples without a universal statelike organization, subjecting the whole world to a law based on compulsion, obviously is as much in conflict with a voluntarily created world republic as with a global monarchy established by force.

Thus the league of free states, which Kant regarded as a mere "substitute" for the world republic, in fact appears to be the ideal goal of human development, a goal which is in agreement with nature's intentions. The appropriate organization of the world is not a superstate but an organization of a particular type.² It is

to be created by an agreement of free states which remain free as members of the organization. The law which is to govern their relationships is based on the principle of their freedom.

Nature itself, in Kant's opinion, guarantees the maintenance of peace in an association of free states and therefore makes a world state unnecessary. He believes that nature has implanted in all men certain selfish inclinations which, whether they want it or not, drive them toward peace—that is, toward the goal which reason orders them to reach. Thus, the natural division of the world into independent units is supposed to impel the peoples to organize their states as well as possible in order to be able to protect themselves efficiently against other states. The best constitution is the republican, which constitutes a safeguard not only of internal but also of international peace. Moreover nature, which keeps the various peoples apart, also unites them through the "commercial spirit" which, according to Kant, sooner or later affects every people; this spirit induces the peoples to preserve peace because commerce appears to be incompatible with war. Kant hopes that the commercial spirit will lead to the observance of the rule which he lays down in the third definitive article for perpetual peace. This article provides for a limited right of world citizenship; namely, for a world citizenship limited "to conditions of universal hospitality." All men, although remaining citizens of their own states, shall have the right, for the purpose of establishing contacts, to visit foreign countries and, when they are admitted, to be treated there without hostility so long as they behave peacefully. In this way friendly intercourse between peoples living in different parts of the world can be brought about; an intercourse which appears to be essential for the eventual realization of universal peace. Kant thus assumes that under the influence of the natural inclinations of men, mankind moves toward a peace maintained in a league of states which are to remain free from any type of world government. In this league the limited right of world citizenship is intended to express the bond uniting all individual members of the human race.

The goal of this development is permanent peace as the only situation corresponding to the dictate of reason. The ideal condi-

tion which Kant has in mind, therefore, is not an international community governed by a law of nations which, like Grotius' or Wolff's volitional law and later the international law of the positivists, admits the starting of a war without any restriction. But Kant's postulate of absolute peace seems to be also incompatible with the theories which maintained that natural law, under certain conditions, gave a state the right to wage war against another state. The ideal condition conceived of by Kant does not coincide therefore with that of Grotius, who assumed that war as a method of law enforcement was an essential element of the ideal, natural, legal order of the world.³ It has been seen above that Wolff, who in his natural-law theory maintained the concept of war as a legal means of self-help, considered war to be generally incompatible with man's reasonable nature. The analysis of his doctrine disclosed the tendency to regard the ideal condition of mankind as characterized by the complete absence of war and by the general strict observance of the pure law of nature and reason, which was supposed to make war unnecessary. To this extent Kant's views concerning the ideal situation seem to be similar to Wolff's. But there is an essential difference between Kant's and Wolff's ideas. In Wolff's theory the rule of pure natural law which implied permanent peace was a merely theoretical, unrealizable, ideal. Kant, however, regards the effect of the natural forces driving men toward a situation which reason orders them to reach as sufficiently certain to justify the hope that permanent peace may eventually be established.

The idea that as far as the problem of war is concerned the condition of mankind can be expected to change is of the greatest importance with regard to the development of the concept which is the subject of this study. In the natural-law theories analyzed before, the condition of the world was regarded as essentially unchangeable. There was an unalterable difference between the world as it ought to have been, on the one hand, and the world as it actually was, on the other. This difference was expressed, for instance, in Wolff's theory of the two kinds of international law. The necessary law of nations was the legal order of an ideal world, while the volitional law of nations was a law adapted to

reality. Wolff did not believe that the historical development would ever make the volitional law unnecessary. Now, however, it seemed possible to hope that some time in the future the real situation of the world would coincide with its ideal condition and that the dictates of reason would be actually observed.

Kant assumes that certain inclinations which nature has implanted in men will be instrumental in bringing about this change. On the basis of similar assumptions the theory developed during the nineteenth century that all peoples had certain natural interests which united them in such a manner that the maintenance of universal peace and order was assured. Since these interests were supposed to be common to all men, they appeared to express the solidarity of mankind in a world divided into separate independent states.

In this connection the question was bound to arise as to why the natural interests had not yet resulted in permanent peace. The logical answer to this question seemed to be that the working of the natural forces leading mankind toward peace had been obstructed in the past by adverse circumstances. Certain specific obstacles appeared to have prevented the natural interests of men from asserting themselves. From this viewpoint it seemed to be possible to explain why permanent peace had not yet been established and, at the same time, to determine correctly on what conditions the realization of this goal could be expected in the future.

All men were supposed to have a general interest in peace. As Kant pointed out, this interest could become of practical importance only when the will of the people could find expression through a representative form of government. Economic interests, based on what Kant called the "commercial spirit," were considered to constitute the strongest bond uniting the world. When these interests were allowed to express themselves without arbitrary interference, peaceful intercourse between the various peoples seemed to be guaranteed. Kant had assumed that nature itself had separated the peoples from one another. The idea that there existed a natural criterion of separation was further developed during the nineteenth century. This criterion was found in the nationality principle, which was supposed to imply

a natural interest of all individuals belonging to a certain nation to be united in a state of their own. The nationality principle was not generally observed; it was believed that once this condition was changed and states coincided with nations, an important cause of war resulting from the disregard of natural human interests would be eliminated.

THE INTEREST IN PEACE

Kant considered the existence of republican constitutions to be an indispensable condition of permanent peace. The adherents of the natural-law idea, whose theories of a law binding upon independent states have been analyzed in the first part of this study, had supposed that the preservation of international peace and order mainly depended on the rulers' knowledge of the law of reason and on their willingness to abide by its rules. In this connection those authors made no distinction between absolute monarchs and other rulers; in any case, they were not very hopeful with regard to the general observance of the dictates of reason. All hope that peace and order could ever be preserved so long as states were governed by absolute rulers was bound to disappear under the influence of the theories which, following Locke's doctrine, excluded absolute monarchy as a reasonable form of government. If a ruler with unlimited powers was not to be trusted as far as the exercise of his authority within the state was concerned, neither could he be expected to act reasonably in the international field. This idea is expressed in the critical remarks which Rousseau attached to his extract of the Abbé de Saint-Pierre's project for perpetual peace.⁴ Rousseau recognized the advantages which would follow from the acceptance of the project for the princes as well as for the peoples. One of the facts the Abbé had overlooked, however, according to Rousseau, was that princes never act reasonably and cannot be expected to do so; even as far as their own interests are concerned they follow the apparent rather than the real ones. Their two main objects, which are closely related to one another and which are both opposed to the interests of their peoples, are despotism within a state and conquest without.

From a similar viewpoint Kant develops his idea of the relationship between peace on the one hand and a republican constitution on the other. In his opinion the possession of power inevitably impairs the capacity of reasoning.⁵ Peace cannot be secured, therefore, so long as the undertaking of war depends entirely on an absolute ruler, whose power is not limited by a republican constitution.

If (as is inevitable in this form of constitution) the sanction of the citizens is necessary to decide whether there shall be war or not, nothing is more natural than that they would think long before beginning such a terrible game, since they would have to call down on themselves all the horrors of war, such as, to fight themselves; to pay the cost of war out of their own pocket; miserably to repair the devastation it leaves behind; and to add to the over-abundance of misery they would themselves have to bear the burden of debts which, owing to ever new wars, could never be paid off and would thus embitter peace itself; whereas in a constitution in which the subject is not a citizen; *i.e.*, one which is not republican, war is the least considerable matter in the world, because the Sovereign is not a member of the State, but its owner. He abates nothing of his feasts, sports, pleasure palaces or court festivities, etc., through the war, and can therefore declare war as a sort of pleasure-party on the slightest provocation, negligently leaving its justification, for decency's sake, to the diplomatic corps ever ready to hand for this service.⁶

Kant here assumes that the peoples naturally are in favor of a peaceful policy because such a policy, which corresponds to the dictates of reason, at the same time corresponds to their interest. Under absolute rulership this general interest in peace cannot express itself. Representative government, therefore, becomes an indispensable condition of the states' peaceful behavior, because this type of government allows the peoples to determine the actions of their respective states according to their, the people's, own interests. From this viewpoint it seems possible to hope that, once all peoples have adopted a representative form of government, the division of the world into separate states no longer will disrupt the unity of mankind in such a manner as to make war inevitable. The interest in peace is supposed to be common to all peoples. The foreign policy of a state, which is conducted in agreement with the interest in peace of that state's own citizens,

thus necessarily is also in agreement with the interest of the citizens of all other states. It can be assumed therefore that, when all governments fulfill their role of agents of the peaceful peoples, states will generally behave in accordance with the interests of mankind—that is, of the masses of individual human beings who derive no advantage from war. In this case no universal state appears to be required to achieve peace and order in the world.

In this respect, states seem to be different from individuals, who must subject themselves to a common government in order to be able to lead an orderly and peaceful common life. In his criticism of the world-state idea, Wolff's disciple, Vattel, had used the argument that "states are not like individuals in the conduct of their affairs."⁷ Pufendorf had already maintained in this connection that the creation of states had eliminated the state of nature as far as isolated individuals were concerned, and that the state of nature which continued to exist among the states themselves was not entirely comparable to the condition of isolated individuals.⁸ States, in fact, are institutions the purpose of which is to guarantee law and order. In the light of the theories, however, which laid down reasonable standards of government, states could not be regarded as properly fulfilling this task unless these standards were adopted. Thus Locke had demonstrated that an absolute monarch still was in the state of nature as far as his relations to his subjects were concerned, and that therefore absolute monarchy could not be a form of civil government. Only when the states were governed in a reasonable manner could they be considered as instruments of law and order. Insofar as this character of the states seemed to justify the assumption that they could live peacefully together without being subject to a higher authority, general acceptance of reasonable standards of government appeared to be a condition of international peace and order.

It has been shown above that the liberal-democratic concept of reasonable government, as it developed during the nineteenth century, facilitated the belief in the existence of a legal order binding upon independent states, and that, in the light of this concept, such a legal order even appeared to be necessary in order to make complete the states' subjection to law. According to the same

pattern of thought it seemed possible to expect the observance by the states of rules regulating their mutual relationships and the maintenance of peace among them only if these states were bound by law in their internal spheres—that is, if the exercise of public authority were subject to legal limitations designed to guarantee the individual liberty of the citizens and to secure their participation in the government. The idea that there was such a correlation between the internal regime of states and the situation existing in the international sphere was generally accepted by those who believed in the gradual improvement of mankind's condition. That idea thus has become an essential element of the concept underlying "internationalism"—a movement the purpose of which is the promotion of peaceful and orderly international relations. The champion and historian of this movement, Christian Lange, declares: "Internationalism allies itself naturally to all democratic efforts within states tending toward transformation into free and voluntary societies founded on consent and not on the principle of subjection." ⁹

According to the same author, "internationalism is by definition opposed to cosmopolitanism. The latter is unitary; it regards all humanity as a single social group." ¹⁰ The world state is not regarded as the natural goal of mankind's development. The ideal condition toward which this development is supposed to lead is the peaceful coexistence of peoples governing themselves freely in a community which does not deprive them of their freedom by subjecting them to a world government. The maintenance of peace within this community depends on the reasonable behavior of its members. Such behavior is expected to prevail once the states are no longer instruments of arbitrary power but bodies whose conduct is determined by the masses of the peoples, who throughout mankind are supposed naturally to prefer peace to war.

THE ECONOMIC INTEREST

Kant saw in the commercial spirit of men, which he supposed to be incompatible with war, the means used by nature to unite the peoples of the world who were separated from one another by the fact that they formed independent states. During the nine-

teenth century the idea became widely accepted that commerce had a beneficial effect with regard to the peace of the world. It was assumed that the economic interests of the various peoples were not conflicting but in harmonious agreement, that they were opposed to war, and that, if allowed to assert themselves, they were likely to induce mankind to preserve peace.

This concept was fully developed in the middle of the nineteenth century. It is very clearly expressed in the following passage from John Stuart Mill's *Principles of Political Economy*:¹¹

commerce first taught nations to see with good will the wealth and prosperity of one another. Before, the patriot wished all countries weak, poor, and ill-governed, but his own; he now sees in their wealth and progress a direct source of wealth and progress to his own country. . . . It is commerce which is rapidly rendering war obsolete, by strengthening and multiplying the personal interests which are in natural opposition to it. . . . And . . . it may be said without exaggeration that the great extent and rapid increase of international trade, in being the principal guarantee of the peace of the world, is the great permanent security for the uninterrupted progress of the ideas, the institutions, and the character of the human race.¹²

Mill deals in this passage with the "moral advantages" resulting from commerce in addition to its economic benefits. The former obviously depend on the latter insofar as trade is supposed to lead to peace because, from the economic point of view, peaceful commercial intercourse proves to be profitable to all concerned. To demonstrate the effects of commerce is the task of economic science. This science had been "founded" before Kant wrote his essay on *Perpetual Peace*, and his opinion concerning the importance of the commercial spirit for the maintenance of peace clearly corresponds to ideas expressed by its founders.

There is an obvious connection between economic science in the first stages of its development and the natural-law theories which have been analyzed before. Pufendorf's and his followers' thesis, that the state of nature was a condition of peace, implied that theoretically war is not inevitable between persons who live together without being subject to a common authority and who naturally are interested primarily in their own advantage. The reasonable interest of each person in his own advantage was sup-

posed naturally to be compatible with the corresponding interest of the others and thus with the interest of the community. The idea of such a natural harmony of reasonable interests was, however, merely a theoretical assumption in the natural-law doctrine; its adherents did not believe that, as far as the international sphere was concerned, harmony could ever be successfully preserved. Economic science now seemed to provide scientific proof of the existence of a natural harmony of interests. It appeared to show the processes by which this harmony maintained itself, unless it was arbitrarily disturbed, and to make it possible scientifically to determine the causes of disturbance.

The Physiocrats, who were the first to formulate a system of economic doctrine, tried to demonstrate theoretically the existence of a harmony between the particular interests of the individuals and the common interest in the economic sphere.¹³ They conceived of a universal and immutable natural order governing social life; every reasonable human being was supposed to be able to understand its rules. If individuals enjoyed the liberty of following these rules, the free interplay of actions motivated by reasonable self-interest was expected to result in a condition beneficial to all. Adam Smith's *An Inquiry into the Nature and Causes of the Wealth of Nations*,¹⁴ which marks the beginning of classical economics, was permeated by the idea that the spontaneous actions of individuals seeking their own economic advantage produce results favorable to general economic progress. Although this idea was not formulated as a general theory, it found clear expression in the discussion of particular economic problems and institutions.

This concept of the beneficial effects of individual self-interest necessarily leads to that of the individual's economic liberty as a condition of satisfactory results of economic activities. Smith declares that the government does not have the duty of "superintending the industry of private people, and of directing it towards the employments most suitable to the interest of the society;" if it refrains from such interference "the obvious and simple system of natural liberty establishes itself of its own accord." According to the system of natural liberty, which leaves "every man, as long

as he does not violate the laws of justice . . . perfectly free to pursue his own interest his own way," the government has only three tasks to perform: defense against aggression from foreign countries, establishment of an exact administration of justice, and erection and maintenance of certain public works and institutions which it would not be profitable for individuals to erect and to maintain.¹⁵ This view of the limited tasks of the state is evidently in agreement with Locke's theory of government. Economic science seems to prove that a state which in principle limits its activities to the protection of the natural liberty and of the property of its citizens promotes the material interest of the community and of its members.

To the idea of the harmony of interests and its corollary, the principle of noninterference by the state with regard to economic activities, corresponds in the international domain the concept of free trade—that is, of trade left free to take its natural course. Smith devotes a part of his treatise to the refutation of the opinion that in international commerce a nation's gain depends on the loss of another. He attacks the view that a country's trade with another country is advantageous only if it leads to a favorable trade balance and to an increase in the stock of bullion. His examination of governmental practices, such as the introduction of protective import duties designed to benefit one particular nation, reveals that these methods do not fulfill their purpose, but that trade carried out between countries without artificial restrictions is advantageous to them. From the viewpoint of a nation the prosperity of other nations appears to be not detrimental but beneficial.

During the nineteenth century the concept of the advantages of economic liberty within a state and of international free trade was further developed. As far as international trade was concerned, the world appeared as an economic unit divided into different nations. As a result of a free international market each of these nations was supposed to direct its economic activities to the industries for which it was naturally most suited, and to derive the greatest possible benefit from a free exchange of goods with the other parts of the world. Governmental practices restricting the freedom of trade were considered to be based on an economi-

cally unsound doctrine which necessarily had effects in the political sphere insofar as it obscured the fact that peaceful commercial intercourse with others was more profitable to a nation than a policy motivated by the desire to secure for a country exclusive economic advantages, if not otherwise possible, by war and conquest.

It is not necessary to analyze here the theory of international trade. Nor is it necessary to determine whether and to what extent the assumptions that there is a natural harmony of interests and that the general welfare is increased to the highest possible degree through spontaneous actions motivated by the desire to realize one's own advantage are expressed or implied in the writings of those economists who contributed most to the development of the science of political economy after that science had been "founded" by the Physiocrats and Adam Smith.¹⁶

It is certain—and this alone is important in this connection—that political thought in the nineteenth century was strongly influenced by the idea that there existed a natural harmony of economic interests and that its existence was proved by economic science.¹⁷ The belief that economic factors could be expected to produce peace in the international sphere found its basis in this idea. It is expressed in a typical manner in a book published in 1865, which in the form of a history of ideas describes the rise of the spirit of rationalism and, in this connection, deals with the influence which political economy has exercised in the development of mankind. The author, William E. H. Lecky, asserts that political economy contributes to the realization of the ideal of universal peace.¹⁸ The existence of "erroneous economical notions either concerning the balance of trade or the material advantages of conquest" had been one of the main sources of war in the past.¹⁹ But the wrong conceptions "that the interests of adjoining nations are diametrically opposed, that wealth can only be gained by displacement, and that conquest is therefore the chief path to progress" have been steadily subverted by political economy, which "has already effected so much that it scarcely seems unreasonable to conclude that the time will come when a policy of territorial aggrandisement will be impossi-

ble.”²⁰ Free trade has been “effected by political economy”;²¹ its extension tends to destroy “the peculiar advantages of colonies and of conquered territory.”²² As a result of political economy “the sense of common interests unites the different sections of mankind, and the conviction that each nation should direct its energies to that form of produce for which it is naturally most suited, effects a division of labour which renders each dependent upon the others.”²³ Political economy teaches that each nation has a direct interest in the prosperity of other nations. “It teaches too that the different markets of the world are so closely connected, that it is quite impossible for a serious derangement to take place in any one without its evil effects vibrating through all; and that, in the present condition of Europe, commercial ties are so numerous, and the interests of nations so closely interwoven, that war is usually an evil even to the victor. Each successive development of political economy has brought these truths into clearer relief, and in proportion to their diffusion must be the antipathy to war.”²⁴ Nations that are aware of these truths will not only refrain from war themselves, but they will also desire to restrict war “when it does break out, as far as possible to those who are actually engaged,” and will be hostile “to all who have provoked it.”²⁵

International commerce itself here appears not to be a direct source of peace. According to Lecky, “commerce, which links civilised communities in a bond of unity, has ever forced her way among barbarians by bloodshed and by tyranny.”²⁶ Economic interests clearly appear to bind the peoples of the world together only when they are correctly interpreted by these peoples. Political economy has provided this correct interpretation. It is supposed to have demonstrated the unsoundness of a policy based on a wrong principle of selfish interest and to have replaced the doctrines underlying this policy with a theory resting on the principles “of enlightened self-interest.”²⁷ The influence of this principle “is shown to be sufficient to construct the whole edifice of civilisation; and if that principle were withdrawn, all would crumble in the dust.”²⁸

Political economy as understood here is obviously not merely

a science determining the relationships between certain causes and certain effects. By distinguishing between unreasonable interests prejudicial to general welfare, on the one hand, and reasonable, mutually compatible interests, the satisfaction of which leads to generally beneficial results, on the other, this science actually establishes reasonable standards of conduct which ought to be observed. In this respect the principles of economic science appear to be comparable to the rules of the law of nature and reason.

The idea that economic interests must be understood in the light of reason if they are to be in harmony with one another seems to conflict with the assumption that there is natural harmony between the interests of individuals and communities motivated by the desire to realize their own advantage. This conflict disappears, however, if it appears possible to expect that with the advancing civilization of mankind and its growing enlightenment men will regard as their real interests those which they ought to consider as such, and that thus reasonable interests and actual interest will eventually coincide. Then it can be assumed that the normal interplay of human actions motivated by economic interest will produce generally beneficial results, unless this interplay is obstructed by artificial interference, and that economic interest will become a force naturally driving mankind toward peace.

Lecky's theory clearly illustrates this process of reasoning. In spite of the progress already made, the conditions of his times do not seem to him to justify the hope of an immediate realization of all the advantages which can result from commercial intercourse between nations. No decisive progress toward peace appears to be possible "as long as nations tolerate monarchs who . . . regard their authority as of divine right, and esteem it their main duty to arrest by force the political developements of civilisation."²⁹ Under a monarchy of that type reasonable interests cannot possibly assert themselves. "But in order to justify the prospect of a great and profound change in the relations of European nations, it is only necessary to make two postulates. The first is, that the industrial element . . . is destined one day

to become the dominant influence in politics. The second is, that those principles of political economy which are now acknowledged to be true by everyone who has studied them, will one day be realised as axioms by the masses.”³⁰ Lecky evidently thinks that when the knowledge of economic principles has become general and when this knowledge determines the policy of states, the economic relations, which then will be allowed freely to establish themselves between nations, will clearly appear to all concerned to correspond to their interests and will thus result in a strong bond of common interest uniting the peoples of the world. Then “every fresh commercial enterprise” will become “an additional guarantee of peace,”³¹ and a nation’s interests will become favorable to peace “in proportion to [its] commercial and industrial advancement.”³² Lecky believes that, in the course of this development, “the deranging influence of passion” will become continually less, and interest—that is, enlightened self-interest—will become “more and more the guiding influence, not perhaps of individuals, but of communities.”³³ A strong guarantee for peace will be attained, therefore, when “the different states . . . are closely interwoven by commercial interests, when the classes who represent those interests have become the guiding power of the state, and when they are fully penetrated with the truth that war in any quarter is detrimental to their prosperity.”³⁴ It is the combination of “such a condition of commercial activity” with “such a condition of public knowledge” which in Lecky’s opinion will produce “a political transformation.”³⁵ When public knowledge generally makes the real interest of individuals and nations coincide with their enlightened self-interest,³⁶ commercial activity will become an instrument of peace. Then “the principal causes of present perturbations” will be eliminated.³⁷

One of the principal causes of perturbations appears to have been the states’ disregard for the principles of political economy. Economic science is supposed to lay down rules for the conduct of state affairs. In this sense Smith had considered political economy “as a branch of the science of a statesman or legislator.”³⁸ The term “political” economy itself indicates the connection be-

tween economics and politics. But economic science defines the tasks of government essentially in a negative way. A self-adjusting economic system based on spontaneous individual actions which are expected to result in general welfare is obviously incompatible with arbitrary governmental interference in that system's operation. Insofar as political economy is supposed to explain the working of such a system, its existence as a separate science seems to depend on the possibility of isolating from the whole of human relationships those phenomena which specifically are economic, and this scientific isolation must find some basis in reality if the science is not to be mere theoretical speculation. The economic mechanism does not make government unnecessary. It is generally acknowledged that the maintenance of law and order through public authorities is required for the satisfactory functioning of the economic system. But these ends must be achieved without obstructing the system's operation; the governments must recognize the economic liberty of the individual citizens. The political system corresponding to political economy in the sense of the term here used, therefore, is liberalism. Economic liberty represents one particular aspect of that sphere of personal freedom which, according to the reasonable standards of government analyzed above, is to be respected and protected by the state. Economic activities have essentially a private, nonpolitical character, and their beneficial effect depends largely on its preservation. Thus economic science has as subject matter nonpolitical phenomena; it postulates the separation of these phenomena from politics. On the other hand, it is political insofar as the satisfactory working of the economic system depends on the adoption by the states of a certain policy, and above all insofar as it is supposed to produce certain results in the political domain, the most important of which is international peace.

If this goal is to be reached, "the evil of the interference of government with commercial transactions" ³⁹ must be avoided also with regard to international economic intercourse. This intercourse appears as naturally based on private initiative. Free private conduct of business undisturbed by arbitrary govern-

mental interference is regarded as a condition of the satisfactory operation of the international economic system. The latter's functioning depends on contacts between private persons motivated by the interest in private advantage. There seems to exist a bond of an essentially private nature uniting persons of different nationalities in a global community which is primarily not a community of states but of human beings free to establish contacts among themselves. The idea of a community of mankind appears thus to be realized. In this concept, the fact that the world is divided into various political units is of course not overlooked. The theory of international trade, which seemed to provide scientific proof for the optimistic assumptions of the political philosophers, considers, of course, its object to be different from trade between various regions of the same state. Moreover, the criterion for measuring the benefits resulting from international economic intercourse is primarily found in the "wealth of nations," not in the wealth of individuals. It is, however, precisely in the situation characterized by the combination of private activities with the existence of states that the harmony assumedly brought about by economic relationships finds its ultimate expression. The states provide for the individuals the protection and security which are necessary to guarantee the enjoyment of their economic liberty. Thus mankind is divided into different groups with particular group interests. These interests are supposed to be served best if the individuals composing the groups are left free to seek their own profit through business relations with other individuals within the same country or in other countries. The result of such freedom of action is expected to be a condition beneficial to all—that is, to the private persons as well as to the various bodies in which they are united for the purpose of maintaining peace and order. It can then be assumed that the particular interests of these bodies are not antagonistic but coincide with one another and therefore with the general interest of mankind. When state policy everywhere is directed not by arbitrary despots but by the people themselves, or at any rate by those classes which understand their true advantage and the importance of economic liberty, then the division of the world

into states will not disrupt the essential unity of mankind. Thus also from the economic point of view the general adoption of reasonable standards of government appears to be a condition of universal peace. As Lecky says, "liberty, industry, and peace are in modern societies indissolubly connected."⁴⁰ But in addition to liberty and economic intercourse he regards the diffusion of knowledge—that is, of the principles of political economy—as a prerequisite for the elimination of war. In this sense it is political economy which contributes "largely towards the realisation of the great Christian conception of universal peace."⁴¹

Lecky mentions this effect of political economy as one of its "theological" consequences:⁴² "peace upon earth was at first proclaimed as a main object of Christianity."⁴³ In the Middle Ages "the intervention of the Pope had been the most effectual agent in regulating national differences," and Catholicism had exercised a benign influence "in correcting the egotism of a restricted patriotism."⁴⁴ But on the whole the Church had not fulfilled its task of suppressing wars. Christianity had definitely failed to bring about peace when "the sublime conception of a moral unity gradually faded away before the conception of a unity of ecclesiastical organisation."⁴⁵ This last statement indicates the conflict which, as has been shown above, was inherent in the medieval system of Christian unity, the conflict between the idea that there was a higher sphere of justice and Christian love above the domain of temporal rule, on the one hand, and, on the other, the existence of a central organization through which observance of the rules of the higher sphere could be enforced. This conflict was eliminated when, after the Church had lost its position of highest common authority in the Western Christian world, a universal higher law of nature and reason was conceived of which was supposed to impress itself directly on the conscience of human beings. Now, however, the problem arose as to how there could be any hope of effectively maintaining universal peace and order in the absence of a global supranational organization. Political economy, which demonstrates the material advantages naturally resulting from peaceful intercourse between the peoples of the world, seems to provide the solution of this

problem. Economic interests appear to unite the various nations through a bond which Lecky regards as being far stronger than the bond of a common religion had been.⁴⁰ Thus he considers it possible to expect that the Christian ideal of universal peace will eventually be realized as a result of economic factors.

There exists in fact a close correspondence between the ideal concept of Christian unity as it had developed in the Middle Ages and the condition which the community of economic interests was supposed to bring about. The unity of Christendom was to be achieved in a manner essentially different from that in which each of the various political bodies existing within the Christian world was kept together. The community of all Christians—that is, of all individuals belonging to the Church—was regarded as being established through the spiritual sphere. This sphere was higher in dignity than the domain of ordinary rulership, which was the domain of power and politics. From the spiritual point of view, consideration of power and politics appeared to be irrelevant; the particular dignity of the spiritual sphere, therefore, depended on its nonpolitical character. Separation of the two spheres did not mean, however, absence of contact, which would have been impossible since all Christians lived in both spheres at the same time. The standards of the spiritual sphere which constituted the highest criteria of human conduct, and which applied to the rulers and their subjects alike, were particularly to guide the former in the exercise of their authority. The observance of these standards was the condition of harmony in the Christian community, which united all individual Christians separated from one another through the political division of the world. According to the pattern of thought which characterizes Lecky's theory, harmony in the world can be expected to result from economic factors. The maintenance of peace and order, which in the national community is guaranteed through the state organization, is supposed to depend, as far as the global community is concerned, not on a world government but on the ties of common economic interests. The operation of the economic system brings individuals in contact with one another regardless of their nationalities. It rests on the activities of in-

dividuals which have an essentially private, unpolitical character. The economic sphere thus is in principle separated from the political sphere, which is the domain of the state. Economic activity, however, requires the security which the states provide, and the states must observe the principles of political economy in the conduct of their internal as well as external affairs if the economic system is to function without disturbance. The principles of political economy are standards of reasonable conduct; their observance depends on the diffusion of knowledge and the corresponding decrease of irrational passion. In the nonpolitical sphere of reason governed by these principles, harmony is expected to maintain itself among the various political bodies into which the world is divided. The economic sphere is essentially a sphere of material interests which in themselves do not possess particular dignity. But, as Lecky says, "though concurrence of action based solely upon community of interests, considered in itself, has no moral value, its effect in destroying some of the principal causes of dissension is extremely important."⁴⁷ Because the community of economic interests is the basis of universal harmony, it becomes a matter of highest moral importance, and the economic sphere appears to be comparable to the higher sphere through which, in the medieval concept, the unity of the Christian world was established. In the doctrine based on the assumption of a community of economic interests as well as in the medieval concept, harmony among political units is supposed to be effective in a sphere separated from the political domain, although providing standards for the exercise of political power. In both cases it is assumed that the existence of various political bodies does not sever the bond uniting all individuals within the greater community.

The economic sphere is not a legal sphere; the principles of political economy are not legal rules. But these principles appear to be criteria of a reasonable legal regulation of international relations—that is, of an international legal order which takes into account the conditions of the satisfactory working of the economic system. When the undisturbed operation of this system is assured, then it seems possible to expect that economic

factors will contribute to the effectiveness of international law, because the maintenance of order in the international sphere will correspond to the interests of the states. In the course of the nineteenth century this idea became an essential element of the concept of forward-looking thinkers who hoped that mankind was advancing toward more peaceful and orderly conditions in the international sphere. It was assumed that the community of economic interests was to constitute the basis of the reasonable world order of the future. In this sense the internationalist, Christian Lange, declares in his book referred to above: "Internationalism is based on considerations of an economic nature; it looks upon the increasingly developed interdependence of peoples and of states as a fundamental fact. This fact will necessarily affect the political relations between these same groups; political organization must become the natural and logical expression of economic and intellectual reality."⁴⁸ Internationalism, according to Lange, is in favor of free trade, which results in strengthening the ties between peoples, and is opposed to protectionism with its tendency toward isolation.⁴⁹ It is clear that these ideas, for which that author does not give any detailed reasons, are based on the concept analyzed above—the concept of a peaceful world divided into peoples who enjoy a free form of government and are united by reasonable economic interests.

THE INTEREST IN THE REALIZATION OF THE NATIONALITY PRINCIPLE

According to Kant, nature itself had separated the various peoples by the differences of language and religion. The division of the world into different political units seemed thus to be based on a natural principle. The idea that groups of individuals are distinguished from one another by particular, clearly determinable characteristics and that these differences constitute the natural basis of the gathering of individuals in different political bodies was widely accepted during the nineteenth century. That idea was the essence of the doctrine of nationalities, according to which a state was to be composed of individuals belonging

to the same nation, and all those belonging to the same nation were to be united in the same state. This doctrine developed from different sources and in different forms. It is important here insofar as it could be and actually was conceived of in such a manner as to fit in with the pattern of thought analyzed here. The first systematic doctrines of nationality were in fact developed within the framework of eighteenth-century rationalistic thought permeated with the idea of a law of nature and reason,⁵⁰ the same framework within which the principles of economic science were also first set forth systematically.

According to the natural-law theories discussed above, the state was based on consent made binding by the law of nature. Pufendorf considered the establishment of states to be in agreement with nature's design, and regarded them in this sense as natural institutions.⁵¹ On the basis of similar considerations, Wolff developed his theory of the state's duty of self-preservation. This theory was not, as one may think, derived from a desire to glorify the state as an instrument of power and group egoism. States as such were to be kept intact because they constituted the natural means of eliminating the chaotic conditions which would have prevailed if all individuals had remained in the state of nature. It was not easy to understand, however, why it was necessary permanently to maintain the particular states that existed at a given moment. In this connection Wolff discussed the question as to why the duty of self-preservation prevented a particular state from dissolving itself at any time in the same way in which it had supposedly been created—namely, by the consent of all concerned.⁵² His somewhat labored argumentation discloses the difficulty of finding a satisfactory solution of this problem. The principle of nationality, which seemed to provide a natural basis for the common life, within a political body, of a group of individuals, indicated a way leading to the elimination of this difficulty. That principle made it possible to explain why a certain group of individuals wanted to constitute a particular political community and why, when it was constituted according to their wishes they could be expected to want to preserve it permanently. Since a state uniting individuals on the

basis of nationality was supposed to be established in agreement with a natural principle, it appeared to be obvious that such a state ought to be preserved.

It is not necessary here to attempt a definition of the term "nation." At any rate, when the principle of nationality began to exercise its influence on political thought, the sense of the term was regarded as being sufficiently clear for the recognition of the fact that the principle was not generally applied. This fact seemed to affect unfavorably the peace of the world. Disregard of the nationality principle appeared to be a source of wars and revolutions. The principle, therefore, was not natural in the sense that state and nation necessarily coincided everywhere. It was natural rather in the sense that the world's population was regarded as being naturally divided into nations; that all individuals belonging to the same nation were supposed to be naturally interested in being united in the same state; and that the nonsatisfaction of these natural aspirations seemed inevitably to result in political disturbances. One of the necessary conditions of general harmony and peace, therefore, appeared to be that each nation had a separate homogeneous state of its own. An important source of discord was expected to disappear when groups of individuals were allowed to unite in states according to their natural aspirations.

In this concept, nationality as the natural basis for the composition of a state appeared, on the one hand, to be an objective fact, ascertainable through an examination of certain characteristics of the individuals concerned; on the other hand, it was supposed that the wishes of these individuals properly determined the state to which they were to belong. The adherents of the nationality doctrine did not consider these two ideas to be incompatible with one another. They obviously assumed that the wishes of the individuals normally reflected the natural conditions which characterized them as members of a particular nation. The peoples of the world were supposed naturally to have the desire to live in separate political communities constituted in accordance with their respective natural characteristics. It was evident, however, that the supposedly natural aspirations

of nations had not been of great political importance in the past. In the book referred to above, Lecky attempted to explain this fact. He declared that the nationality principle "could not possibly have attained any great importance till the present century . . . because it is only after the wide diffusion of education that the national sentiment acquires the necessary strength, concentration, and intelligence."⁵³ The situation appears to be similar to that existing in the economic sphere. In both cases natural interests, which can be considered to be reasonable because the peace of the world depends on their satisfaction, are supposed to assert themselves, if left free to do so, only after increasing knowledge has made men realize what their true, reasonable interests are. Then the hope seems to be justified that, with the increase of men's knowledge of their natural interests, the wishes of a certain group will become a more and more reliable expression of the fact that this group naturally belongs to a certain nation.

From this point of view the plebiscite appears to be an appropriate procedure for settling territorial questions in accordance with the nationality principle. If the individuals composing the population of a certain territory can be kept free from all outside pressure, they are supposed to base their decision regarding the state to which they are to belong, not on any consideration of temporary advantages that might result from their subjection to one or the other political community, but on their permanent, reasonable interests, the satisfaction of which guarantees a durable, because natural, settlement of the territorial problem concerned. Grotius already had thought that the cession of a part of a state's territory involving the transfer of subjects from one authority to another in principle required the consent of the subjects.⁵⁴ This view was the consequence of his theory that the association of individuals in a state was based on a contract.⁵⁵ The nationality doctrine was bound to strengthen the belief that without the consent of the population changes in sovereignty were inadmissible. The plebiscite appeared to be the natural procedure for ascertaining whether or not the population consented to such a change. Plebiscites were first held during the early phase of the disturbances which followed the French Revolution.

The practice was revived in the middle of the nineteenth century but was abandoned in its latter part. It now seemed possible, however, to refer to historical examples as a proof of the fact that there existed a workable, although perhaps not yet sufficiently perfected, method of determining the boundaries of states and the fact of their inhabitants in accordance with the nationality principle and with the democratic idea that the authority of the state is based on the consent of the governed.

There seemed to exist a close connection between the liberal-democratic concept and the doctrine of nationality. This doctrine actually developed in combination with that concept in the course of the nineteenth century. In his book on the rise of rationalism, Lecky declared that "the democratic ideal . . . exercising so wide an influence" consisted of "two parts—a rearrangement of the map of Europe on the principle of the rights of nationalities, and a strong infusion of the democratic element into the government of each State."⁵⁶ The "rights of nationalities" to which Lecky here referred obviously belonged to the category of rights which men were supposed naturally to possess and which, according to reasonable standards of governments, the states were bound to respect. These standards of government which required the application of the liberal-democratic concept, therefore, required also the realization of the nationality principle. The liberal-democratic concept determines the type of government to which men as reasonable beings are naturally willing to submit themselves, a type of government which guarantees their participation in the direction of the state and the enjoyment of a certain sphere of personal liberty. The nationality principle indicates the political units to which reasonable men naturally wish to belong. In the ideal condition, as it appears in the light of the liberal-democratic idea and of the nationality doctrine, the state thus is based on the free consent of the people with regard to its type of government and the exercise of governmental authority as well as to its composition. From this viewpoint it seems to be certain that peoples left free to determine their fate will normally attempt to realize the ideal condition in its entirety. In particular there appears to be no doubt that a peo-

ple liberated from foreign rule naturally will use its freedom to adopt the liberal-democratic principles—that is, a form of government which is regarded as a condition and guarantee of international peace.

Absolute rulership seems to be incompatible with recognition of the nationality principle.⁵⁷ The rights of nationalities appear to correspond to a duty of the states and their governments to let the nations satisfy their natural interest in forming separate homogeneous communities and thus to contribute to the maintenance of peace. In this respect the nationality principle is a rule of reasonable conduct addressed to the states and their governments. Only the adoption of reasonable standards of government is expected to make the various states recognize and observe such a rule. According to Lecky, it was one of the great problems of the future whether knowledge would make impossible “political combinations that outrage national sentiments.”⁵⁸ In this regard he particularly thought of the knowledge of the principles of political economy, which he supposed guided the conduct of states when they were governed in a reasonable manner. He believed that free trade destroyed the advantages of “great heterogeneous empires,”⁵⁹ and he found in this belief one of the reasons for his hope that motives of self-interest would not “oppose themselves as powerfully as of old to the recognition of territorial limits defined by the wishes of the people.”⁶⁰

So long as the nationality principle is not generally applied, the political division of the world must be regarded as merely provisional. Christian Lange, to whose description of internationalist doctrine we may here refer again, expresses this viewpoint in the following way: “Internationalism wants to be founded on nations and, until such time as nations become autonomous social groups, it recognizes the states as the representatives, though not wholly legitimate, of the incomplete groups within the great society of nations.”⁶¹ States will have a permanent and legitimate character only when they have become nation-states.

Every nation is supposed to be entitled in principle to have a state of its own. It is to have the freedom of conducting its own

affairs without outside interference—a freedom which presupposes the existence of an independent state coinciding with the nation. Moreover, the natural characteristics of a nation form the basis of its particular culture, the full development of which requires the degree of political independence which only the existence of a separate state guarantees. The coexistence of nation-states thus appears to serve the cultural interests of the world community, which, as far as these interests are concerned, depends on the contributions made by the various nations. In this sense Christian Lange declares that internationalism “is convinced that the development of nationalities is bound to serve all international interests through the variety and richness which will thus be guaranteed to the common life of nations.”⁶² The idea of the international division of labor, which is an essential element of the liberal concept of political economy, here appears applied to human activities in general. It is supposed that, on the basis of its specific characteristics, every nation organized as a state is able to make a particular contribution toward the satisfaction of the common cultural as well as material interests of mankind, and that the variety of contributions to the harmonious achievement of common ends is a condition of the full development of the human race.

General application of the nationality principle leaves the world divided into independent states. It is the function of the principle to determine the manner in which this division is to be effected. It is assumed, however, that when the nationality doctrine is applied, the coexistence of independent states will not result in the same conditions which it had produced in the past. As long as states are formed by arbitrary methods, the division of the world results in constant struggles and wars. General observance of the natural and reasonable criteria which the nationality principle appears to provide with regard to the composition of political communities is expected to contribute to the transformation of the world into a community which no longer is essentially characterized by political antagonism between these communities.

Political antagonism between states is the basis of the policy

of equilibrium. This policy evidently is incompatible with the nationality doctrine. The principle of equilibrium seems to make additions to the strength of a state through acquisition of new territories and populations indispensable if another state has increased its strength in the same way; under such conditions respect for the wishes of the populations concerned is not always possible. The nationality doctrine, however, in principle confers upon every nation the right to form its own state regardless of the political consequences and especially of the effects on the distribution of political power among the various states.

It has been shown above that in his theory of positive international law Oppenheim regarded the balance of power as an indispensable condition of the observance of the legal order of the international community—which, according to this doctrine, was a community of sovereign states and from which, therefore, individuals as such were excluded. The international legal order, supposed to consist of rules which the states themselves recognized as binding, had to take into account the fact that these states could not be prevented from using force against each other in accordance with their political interests. Oppenheim thought that in such a community the member states could be expected to observe rules regarding their mutual intercourse only insofar as they kept one another in check through certain power combinations. The idea that the balance of power was a condition of international order and security had already appeared in Wolff's theory of the law of nations, which was a law regulating, within the community of mankind, the relations between independent states. Wolff had made it clear that the policy of equilibrium was necessary because reasonable behavior did not prevail in the world as it actually was. If pure standards of reason were strictly observed, then there would be no risk of war, and a balance of power would be needless. The positivists wanted to build their theory on existing rather than on such ideal conditions. But simultaneously with the positivist theory the idea arose that the conditions existing in the global community were changing and that in the course of this process reasonable conduct became more and more general, while the importance of power was decreasing correspondingly. In this respect the character which

the global community was supposed gradually to acquire appears to be comparable to that of Wolff's ideal world community.

In the universal community expected to form itself among nations governing themselves freely, peace and order are maintained not through the use of power but as a result of the peoples' natural, reasonable interests, which are opposed to war and disorder. The composition of the states into which the world is divided is based on a natural, universally valid principle, the observance of which is in agreement with natural aspirations common to all peoples. The peoples of the various nation-states share the same natural, reasonable interests in peace and peaceful intercourse. These interests can assert themselves freely; for every people determines the policy of its state in accordance with its true interests through a representative form of government. The governments which the various peoples set up, therefore, do not restrict arbitrarily the intercourse between individuals of different nationalities. It is through contacts between private individuals that the friendly exchange of ideas and material goods between the nations of the world takes place. The intercourse of these individuals is the basis of universal solidarity and harmony. The states which allow such intercourse to develop freely have ceased to be barriers between the peoples of the world and to disrupt the unity of mankind; they no longer appear as rigidly separated units with antagonistic interests. Under these conditions the citizens' loyalty to their respective states is entirely compatible with the recognition of the bond uniting the members of the human race in a universal community. Thus Lecky, who, when he wrote the book on the rise of rationalism, considered the development leading to the ideal condition as being already far advanced, observed that patriotism had "lost its old exclusiveness without altogether losing its identity" and that it "has assimilated with a sentiment of universal fraternity."⁶³ In the same passage Lecky declared: "The sympathy between great bodies of men was never so strong, the stream of enthusiasm never flowed in so broad a current as at present; and in the democratic union of nations we find the last and highest expression of the Christian ideal of the brotherhood of mankind."

It has been shown above to what extent the theory of economic

interests as the basis of world peace—a theory which found typical expression in Lecky's book—corresponds to the medieval idea of Christian unity. It is in the democratic union of nations—that is, in a world community divided into nation-states governing themselves in accordance with liberal-democratic principles—that the economic interests appear to be free to exercise their beneficial influence with regard to world peace. The democratic union of nations thus seems to make real on a universal scale and in a perfect and wholly consistent manner the ideal of unity, peace, and harmony, the realization of which had been attempted in the medieval Christian community, and which in the natural-law theory had become a merely theoretical concept. Now the democratic nations are expected to become effectively united by a bond different from and superior to the bond of political organization which keeps individuals together in a national community.

The concept of the democratic union of nations is incompatible with the idea of a world government. Since any nation is supposed to need an independent state of its own in order to enjoy a free development, the world community cannot have the form of a state which would deprive the nations of their state character. Statelike organization, therefore, is not possible beyond the national level. If the global community is to be organized, its organization can only have the character of Kant's league of states, which agree on certain rules of conduct but remain free from subjection to a central government. The unity of the world is effected not in a sphere of universal political organization of the state type, but in a sphere of reason governed by standards of reasonable conduct. These standards are naturally given and can be ascertained by reason. Reason demonstrates the possibility of maintaining universal harmony and peace if certain conditions are eliminated which prevent the peoples of the world from acting in a reasonable manner—that is, in accordance with their natural interests. The creation or elimination of these conditions depends mainly on those who direct the policy of the various states. It is particularly to them that the standards of reason address themselves as standards for the con-

duct of state affairs. These standards do not only concern the relationships between states; they also legitimate the peoples' claims to freedom from unjust oppression and to the enjoyment of liberty within their respective states. The sphere of reason, therefore, is at the same time a sphere of liberty and justice. It is a sphere generally transcending the political sphere, which is the particular domain of the state.

The sphere of reason itself, therefore, is essentially nonpolitical. In the ideal condition, as it is here conceived of, there is no room for politics where the domain of the individual states ends, and reasonable conduct alone can guarantee universal peace and order. When reason indicates clearly the way leading to the maintenance of universal harmony, power as an instrument of international politics is necessarily a disturbing element; its use for political purposes results in deflecting the peoples from a reasonable course of action. Political struggle as a struggle for power in the international field is senseless in the light of reason. The true interests that unite the peoples of the world are best satisfied by the peaceful exchange of ideas and goods from which each nation, whether it be great or small, powerful or weak, derives the greatest benefit. From the viewpoint of the peoples' natural, mutually compatible interests, political deals between states, the product of traditional diplomacy, appear to have an artificial character; they are bound to lose all importance in a global community in which those natural interests determine the intercourse between nations. Thus Lecky was of the opinion that in his time the progress of rationalism already had "profoundly and irrevocably impaired the force of treaties and of diplomatic arrangements as the regulating principles of Europe."⁶⁴ In particular, the policy of equilibrium becomes inapplicable in the course of this development. No system of alliances is required to maintain security in the international sphere and to preserve the states' independence. On the contrary, such a system endangers the peace because it disrupts the unity of the world by opposing power to power. In the international sphere, traditionally the domain of politics, political activity as such appears generally to become unnecessary and dangerous.

THE IDEA OF PROGRESS AND THE BELIEF
IN THE POWER OF PUBLIC OPINION

THE IDEA OF PROGRESS

THE NINETEENTH-CENTURY CONCEPT of a peaceful world community held together by the natural interests of the peoples was clearly based on the idea that the condition of the world was better than it had been in earlier periods of mankind's history and that further improvements could be expected in the future. A development appeared to take place which manifested itself not only in changes brought about by men in the material conditions of life but also in the growing understanding of the true nature of human relationships. This idea, the idea of progress, obviously permeated Lecky's description of the rise of rationalism. The belief in progress in fact had its source in rationalist thought.¹ The idea that mankind is steadily advancing is conceivable only if it is assumed that there exist criteria which make it possible objectively to measure the advance. Rationalist thought as it appeared, for instance, in Lecky's book seemed to find such criteria in the natural, reasonable standards of human conduct. The idea that mankind was moving toward unity to be achieved by the collaboration for the common good of peoples organized in independent states was an essential element of the belief in progress,² and that unity was supposed to correspond to natural principles ascertainable by reason.

Material progress appeared to lead mankind toward unity. Technical discoveries and inventions caused an expansion of industry and commerce which resulted in an increase of international economic intercourse. Improvements of the means of communication and transportation brought the peoples in closer contact with one another. The effect of this development seemed

to be the steadily growing interdependence of peoples, the gradual formation of an indissoluble network of common interests which naturally combined the peoples in a peaceful and orderly world community.

The belief in progress comprised also the hope that men generally would become more and more reasonable. This hope made it possible to combine the concept of a community of interests, effectively uniting the peoples of the world, with the idea that men had to be aware of, and willing to abide by, the dictate of reason if they were to behave in accordance with their true advantage and therefore with the general interest. Men were supposed to base their actions on their true interests when they had learned what these interests were.

Belief in the growing reasonableness of mankind, therefore, implies belief in education as a proper means of promoting unity and peace. It appears to be the progressive thinker's particular task to prepare the way for a better world by imparting to the public his knowledge of mankind's natural interests. The achievement of unity through reasonable nonpolitical interests does not seem to require political activity nor even political propaganda in the usual sense of the term. The principal weapon which the progressive thinker uses in his capacity of leader in the cause of peace is the book in which he tries to present international solidarity and interdependence as facts so evident that their existence cannot be denied by any normally intelligent person. So long, however, as the final state of man's intellectual progress is not reached and education, therefore, is required in order to enlighten those who as yet have been unable to discern the natural trend of human development, the progressive internationalist necessarily distinguishes between two realities: he points to the "true" reality of the oneness of the world as opposed to the "false" reality of a world still disrupted by political antagonism between states with conflicting interests. While he considers all peoples as actually united by common interests, he favors the establishment of new nonpolitical contacts between individuals of different nationalities because these contacts are supposed to make the fact of international solidarity more "real" and more evident.

Discrepancies of this kind will disappear only when progress has reached its goal, as it appears in the light of this concept. Then men generally will understand their reasonable interests and these interests will effectively bind them together in a peaceful universal community. Human behavior will naturally correspond to the standards of reason. Since there is only one reason, there will be no differences of opinion either with regard to the goal to be reached by mankind or with respect to the ways leading to that goal. The assumption that mankind is advancing toward such an ideal situation expresses the highest degree of optimism to which the concept of rules of reasonable behavior deduced from the nature of man can lead.

This concept had been developed in the natural-law doctrine. Grotius had systematically presented a law of nature and reason as the legal order of the world community. But his natural-law theory in fact was no more than a pious philosopher's dream. Grotius himself recognized that, on the whole, his system of natural law was not capable of practical application. The fact could not be overlooked that man's behavior did not generally correspond to the highest rules of conduct which were supposedly deduced from his nature as a rational being. Thus Christian Wolff distinguished between man as he ought to be and man as he actually was; Wolff conceived of the volitional law of nations—which, like Grotius' volitional law, admitted the undertaking of war without restrictions—as the legal order adapted to man's actual condition. The idea of progress makes it possible to expect that reasonable behavior will become normal, in the sense that it is general and typical as well as in the sense that it indicates the norms to be observed. If unreasonable conduct should occur in isolated cases, it then will be immediately recognizable as such by being different from typical behavior. Man as he actually is is thus supposed gradually to become identical with ideal man. Although nineteenth-century progressive writers do not use this terminology, the idea is clearly implied in their concept. This idea enables them to hope that the arbitrary use of force eventually will be eliminated from the world.

It has been shown above that the ideal condition expected to

result from the progressive development of mankind corresponds to Wolff's ideal world order rather than to that of Grotius'. In Grotius' theory, war was a legal procedure of law enforcement; the legal character of the universal system of rules was supposed to depend on this procedure. The rulers of the states were regarded as being entitled to go to war in the capacity of guardians of the universal law; in this capacity they were even authorized to use force for the defense of a people unjustly oppressed by its ruler. In Wolff's doctrine, the ideal situation seemed to be characterized by the absence of actions which made compulsion necessary. Disputes regarding the respective rights and duties of states could arise even under ideal conditions; but they could be settled by peaceful methods, especially by arbitration. Harmony in the universal sphere appeared to be secured by the fact that every state primarily took care of its own affairs in an intelligent and reasonable manner.

The state of perfection to which progress is supposed to lead is also characterized by the complete absence of war in a universal community in which the peoples' conduct is motivated by their own reasonable interests. Armed conflicts seem to be inevitable as long as there are governments which disregard these interests. Insofar as wars are provoked by unreasonable policies which obstruct mankind's advance toward perfection, the use of force can, from the progressive viewpoint, even be regarded as necessary and just. This can be the case, for instance, when war is waged in order to satisfy a people's natural desire for national unity. But it is assumed that progress will bring about stricter voluntary observance of the nationality principle as well as of the other standards for the reasonable conduct of state affairs, and that thus eventually there will be no more just causes of war. All wars then clearly become prejudicial to the true interests of states, not only of those directly involved but of all others as well. Differences between states can satisfactorily be settled by peaceful procedures. The progressive internationalist, who regards the promotion of arbitration as one of his most important tasks, thinks it safe to expect that states will generally become reasonable enough to submit their disputes to arbitration and to respect the awards of the arbitrators.

States which normally behave in a reasonable manner have no cause for interfering in each other's internal affairs. The standards of reason which the progressive concept presupposes are concerned not only with the relations between states, but also with the manner in which the states themselves are governed. Under ideal conditions, however, it is to be expected that the states generally will be governed in a reasonable way. Then neither revolutions are to be feared nor can the question of enforcing the observance by a state of the reasonable principles of government arise for the other states.

From the progressive viewpoint, the general voluntary application of reasonable liberal democratic principles appears indeed to be a condition of the maintenance of peace. It is assumed that if all peoples are governed in a manner allowing them to determine the conduct of state affairs in accordance with their interests, their increasing reasonableness will make the peaceful coexistence of states possible. It is generally not expected, however, that the growing reasonableness of the peoples, which seems to justify the hope of world peace in spite of the absence of a world government, will ever permit these peoples to preserve peace and order in their respective national communities without a state organization. Progressive thinkers, as a rule, do not question the necessity of states. They try to demonstrate that, unlike individuals, states can live together without being subject to a common statelike authority. In a passage quoted earlier, Lecky, for instance, declares that, instead of passion, interest, in the sense of enlightened self-interest, "becomes more and more the guiding influence, not perhaps of individuals, but of communities." This statement evidently is meant to express the difference which exists between individuals and states with regard to the possibility of peaceful coexistence without a central government. Here the state rather than the individual seems to acquire the characteristics of the ideal man, whose actions always are guided by his true interests. But Lecky obviously bases his hope that the states will become more reasonable on the progressive enlightenment of the masses of individuals composing them. The progressive thinker thus arrives at a somewhat inconsistent idea: the masses of individuals, whose

rationality will make the states behave in accordance with their natural interests, will remain unable to dispense with the state organization as far as their peaceful and orderly national existence based on the community of national interests is concerned. From this viewpoint the states, on the one hand, appear to become perfectly reasonable; on the other hand, they remain political institutions which for the fulfillment of their tasks depend on compulsion and power, and which therefore represent a bond of unity inferior in kind to that which is supposed to keep the universal community together.

These inconsistencies find their explanation in the general tendency of the progressive concept of the global community. The progressive internationalist takes the existence of states for granted. He attempts to find an answer to the question as to how peace and harmony can be preserved in a world which now is, and is to remain, divided into independent political bodies. The answer must be found not in the disappearance of the states, but in a principle of global unity different from the principle of state organization. The concept of a sphere of universal reason, transcending without eliminating the sphere of the states, seems to provide the natural solution of the problem.

Before the first World War adherents of the progressive concept usually did not express themselves clearly with regard to the time required for the complete realization of that concept. It was often asserted that the attainment of the ultimate goal, permanent peace, could be expected only in a very distant future. But it was generally assumed that decisive advances toward more reasonable conditions had already been made and that the world was better than it had ever been before. To justify this assumption it seemed possible to point to certain facts. While there still had been wars, there had been, since the end of the Napoleonic conflagration, no general conflict of similar dimensions. Liberal-democratic principles of government had found application to a growing extent. In Europe new states had been constituted in a manner which seemed to conform to the nationality doctrine. Two great powers, Italy and Germany, had arisen as the result of movements which combined liberal-democratic elements with the idea of nationality.

Important disputes had been settled by arbitration, and the willingness of states to submit their differences to arbitration seemed to increase steadily. The Hague Peace Conference of 1899 had created the Permanent Court of Arbitration in order to facilitate the settlement of disputes by this peaceful method, and this fact had stimulated the adoption of general arbitration treaties. International economic intercourse had greatly expanded. The existence of common nonpolitical interests was evidenced by a certain number of multilateral conventions regulating matters of a nonpolitical character. Several of these conventions had provided for the establishment of permanent international agencies. Moreover, private initiative had resulted in the creation of international organizations which, in some particular fields of human activity, kept individuals and groups of individuals in mutual contact. These organizations of a nonofficial character were considered to be of particular importance because they seemed to attest the spontaneous growth of international relationships based on a community of interests.

The progress thus made appeared to be permanent. The idea of progress implies the belief that mankind advances always in one and the same direction—namely, in that which finally leads to the condition of highest perfection. There seemed to be, therefore, no reason to fear that positions once reached on the road to perfection would ever be abandoned altogether in the future. Consequently, it could be assumed that some permanent improvements had definitely been achieved in the world.

THE BELIEF IN THE POWER OF PUBLIC OPINION

The belief in progress not only made it possible to hope that states would gradually adopt a more and more reasonable and peaceful course of behavior. It also suggested the idea that an authority was arising in the world which, without the use of physical force, could compel states to follow the dictates of reason. This authority was public opinion.

In his essay on *Perpetual Peace*, Kant had made the suggestion that all states should allow the philosophers to express freely and publicly their opinions regarding the conditions on which the

peace of the world depended. The philosophers were the first to discover these conditions. Their lack of any power other than that inherent in the conclusiveness of their arguments seemed to exempt them from the ill effects which the possession of power was supposed to produce over men's capacity of reasoning. It therefore appeared to be desirable in the interest of peace that governments should hear the philosophers' advice with regard to the conduct of international policy.³ When progress seemed to make mankind in general more and more reasonable, it was no longer regarded as necessary to rely on the advice of some specially qualified individuals for the maintenance of peace and order in the world. The masses were supposed to acquire the knowledge that previously only these individuals had possessed. On the basis of this knowledge of the standards of reason and justice, the masses of individuals composing the various states were expected spontaneously to watch over the observance of these standards throughout the world. Since, from the progressive viewpoint, all peoples were equally interested in peaceful international intercourse, the fact that, according to the judgment of the rest of mankind, a state acted in a manner incompatible with the general interest seemed bound to arouse universal resentment and indignation. If, in spite of this reaction, a state persisted in its unreasonable course of action, and war was inevitable, public opinion could be supposed to support those who were engaged in war against that state. But it was hoped that it would become generally impossible for a national community to withstand the pressure of universal disapproval and that the threat of moral isolation implied in this disapproval would become sufficient to keep states from disturbing the peace of the world. Thus world opinion could be conceived of as a power compelling the observance by states of standards of reasonable conduct.

No central organization seemed necessary to make world opinion uniform. Grotius had thought that, in the absence of a world organization, there could be no uniformity of judgment with regard to the just or unjust character of actions performed within the global community. In the natural-law doctrine as it developed under the influence of Pufendorf's concept, the principle of natu-

ral liberty and equality made every state the ultimate judge of the conformity of its actions to the rules of reason; but its judgment was not binding upon the other states. Progress is supposed not only to make the masses understand the general conditions of universal peace and order but also to enable them, through public opinion, to pronounce a universally valid judgment on the conduct of states in every concrete case. In order to fulfill this task public opinion normally does not have to decide intricate legal questions. According to the progressive concept, international disputes regarding the respective rights and duties of states are to be settled peacefully by special procedures, particularly by arbitration. The criterion of reasonable conduct then corresponds to that which Wolff had established in his natural-law theory of war; it is a state's willingness to have a dispute settled by peaceful methods instead of relying on its power for the solution of the conflict. If this criterion is used, it appears to be relatively easy to arrive at a decision regarding the reasonableness of the states' behavior.

As the expression of man's rational nature, public opinion in its judgments disregards the relative power of the states concerned. The strong and the weak alike are subject to its guiding and restraining power. When this power is effectively exercised, then every state whether powerful or not enjoys the complete security which is a condition of reasonable conduct. For, in order to be able to follow a reasonable course of action, it is not sufficient for a state to know the rules of reason and to be willing to observe them. If the state cannot be certain that all other states will observe the same rules, it necessarily must continue to play the traditional game of politics, which implies the policy of equilibrium and alliances. Under the rule of public opinion there is no need for such power combinations.

As the highest world authority, public opinion, in this concept, evidently represents the community of mankind—that is, the global community of all the individual members of the human race which in the natural-law theory had been the ultimate basis of universal solidarity. But, especially as a result of the theory which regarded the states as free and equal persons coexisting in

a state of nature, the concept of a global community of which only states were members had arisen in the natural-law doctrine itself. The positivist doctrine of international law finally had rejected altogether the concept of the community of mankind as a legal concept and thus had rigidly separated the national from the international sphere. The progressive concept emphasizes again the solidarity of the members of the human race—a solidarity which the division of the world into states cannot destroy if the states observe certain standards in the management of their internal as well as external affairs. These standards belong to the sphere of reason transcending the political sphere as represented by the states which, however reasonable their conduct may become, remain organizations based on compulsion and power. The sphere of reason is the sphere of mankind—that is, of the masses of human beings who, without a common statelike organization, are united by their common rational nature. Mankind is the guardian of the highest standards of conduct. It exercises its authority over the states through public opinion.

This authority over the states, however, can be exercised only if the states themselves allow public opinion freely to form and express itself. In this respect the freedom of the press is of particular importance. The press, which is supposed to represent public opinion and which provides for its diffusion, must enjoy full freedom if public opinion is to produce its beneficial effects with regard to the peace of the world. Freedom of the press thus becomes an essential condition of peace. It appears to be one of the principal features of the liberal-democratic type of government on which the maintenance of harmony in the universal community seems to depend.

If public opinion is to perform its functions in the interest of world peace and order, it is evidently necessary that the public should be fully informed about events in the global community. Such information seems possible only if states conduct their foreign policy openly. Secret dealings between governments, especially, not only appear incompatible with the democratic principles to be observed within each state; they also make impossible the control of governmental policy by the public opinion of man-

kind. Moreover, secrecy itself seems to imply the unreasonable character of the policy to be concealed. In his *Perpetual Peace*,⁴ Kant already had pointed out that a rule of conduct that has to be kept secret if the intended action is to succeed, because its open acknowledgment would arouse general opposition, must necessarily be unjust and imply a menace to everyone. In the ideal democratic union of nations in which public opinion is expected ultimately to preserve peace, there is obviously no place for secrecy in the conduct of the foreign affairs of states.

Public opinion as a guardian of universal harmony evidently can exercise its full authority only in a condition of general reasonableness. Such a condition alone guarantees the formation and free expression of uniform world opinion. Moral pressure can be an effective means of compulsion only if even the state which contemplates a course of action incompatible with the interests of the global community feels so strongly the universal bond of common standards of reason and justice that resistance to the threat of moral isolation becomes impossible. The growing power of public opinion, as conceived of here, is the result of the same process of increasing rationality which is supposed to make the states more and more reasonable. Consequently, it is to be expected that the stronger this power grows, the less frequently its exercise will be required to keep states from acting in an unreasonable manner.

The belief in the beneficial effect of public opinion developed in the course of the nineteenth century. When, for instance, in an essay published in 1840,⁵ the American pacifist, William Ladd, presented the plan of a world organization comprising a Congress of Nations and a Court of Nations, he assigned important functions to public opinion. In particular, public opinion seemed to him to make it unnecessary to provide for the enforcement of the awards of the Court of Nations by physical power. In this connection Ladd expresses himself in the following way:

I believe that, even now, *public opinion* is amply sufficient to enforce all the decisions of a Court of Nations . . . and public opinion is daily obtaining more power. If an Alexander, a Caesar, a Napoleon, have bowed down to public opinion, what may we not expect of

better men, when public opinion becomes more enlightened? The *pen* is soon to take the place of the *sword*, and reason is soon to be substituted for brute force, in settling all international controversies. Already there is no civilized nation that can withstand the frown of public opinion. It is therefore necessary, only to enlighten public opinion still farther, to insure the success of our plan.⁶

Ladd expects that "as intercourse between nations increases, the power of public opinion will increase."⁷ Consequently, in his scheme, which provides for a legislative and a judicial organ (the Congress and the Court of Nations), he feels justified in "leaving the functions of the executive with public opinion, 'the queen of the world.'"⁸

The organizational details of Ladd's project are here less interesting than his ideas regarding the role of public opinion as a quasi-governmental power in the global community. While the realization of such a scheme as that suggested by Ladd was not generally considered to be feasible by contemporary progressives, his faith in the growing power of public opinion can be regarded as typical of nineteenth-century progressive thought. Public opinion appeared to be the highest universal authority, which ultimately ensured the preservation of a reasonable world order. According to the progressive concept, public opinion also played an important part within the various national communities. In a liberal-democratic state it was supposed to constitute the basis of government. But whereas within the state it guided and supported the exercise of governmental power through a centralized organization, in the global community public opinion was expected directly to perform quasi-governmental functions.

The idea that there is a world authority different in kind from the organs of government of the various states is one of the most important among those elements of the progressive concept which make it possible to consider the democratic union of nations as the fulfillment of the medieval ideal of unity. There are in fact certain common features which make public opinion comparable to the highest authority in the medieval Christian world, the Pope. Like the Pope, public opinion is conceived of as an authority above various political bodies, and independent of them. In neither

case is the possession of material power an element of authority; nonpolitical moral force is supposed to maintain harmony in the political sphere. This task does not imply direct and continuous governmental activity. Like the Pope, public opinion is expected to intervene only when a disturbance of the harmony makes an intervention necessary.

If there exists a similarity between the functions of the medieval Popes and those of public opinion it must be observed, however, that public opinion, in the role attributed to it in the progressive concept, is supposed to perform effectively a task which the medieval papacy seems to have been unable to fulfill properly. The very fact that there was a central organization in the medieval Christian world appeared to have led to conditions under which the higher sphere inevitably became confused with the lower sphere. The Popes had descended into the field of politics, and thus the spiritual power had lost its character as the impartial guardian of justice. The progressives' belief in the power of public opinion is the outcome of a theoretical development which started when the Church had been deprived of its position of generally recognized highest authority in matters of faith and conscience. In the theory of natural law, which developed the idea of a legal world order in the absence of a world organization, respect for the rules, on whose observance global peace and order depended, was supposed to impose itself directly on the conscience and reason of men. Progress was expected to make mankind more and more conscious of the principles governing the peaceful coexistence of peoples. Thus, the conscience of mankind seems to arise as an effective force ensuring the respect of reasonable standards of conduct in the universal sphere. Public opinion appeared to be the voice of mankind's conscience guided by reason. In public opinion the world seemed to acquire a supreme authority without entrusting power to an individual or to a limited body of individuals.

THE NINETEENTH-CENTURY CONCEPT OF
THE UNDESIRABILITY OF A WORLD STATE

IN NINETEENTH-CENTURY PROGRESSIVE THOUGHT it was clearly implied that a world state not only was unnecessary but also was undesirable. If it were possible to maintain peace and order in the world without a universal government, then the progressive had no motive for seeking a solution of the international problem as a result of which his own state, as well as all other states, would have lost the independence which was the basis of every national community's particular way of life. From the progressive viewpoint there appeared, however, to be more profound reasons for the rejection of a world state. Unity achieved among free peoples by the community of natural interests and by the general recognition of common standards of reason and justice seemed to be superior in dignity to unity effected by a powerful world government. The ideal situation which progress was expected to bring about could satisfy men's desire for living in separate independent groups, as well as their longing for a sphere of reason, liberty, and justice beyond the states. A single universal state, which would have deprived the national communities of their independent existence, would also have eliminated that sphere.

These arguments against a world state, generally implied in the progressive concept, were explicitly used by a nineteenth-century progressive writer, the Belgian jurist and historian, François Laurent. He discusses the question of world organization and, in this connection, states the reasons for excluding world government as an ideal goal of human development. A brief analysis of his ideas on this subject may at the same time serve as a recapitulation of some important elements of progressive thought. Laurent discusses the world state in the introductory chapter of his *Etudes*

sur l'histoire de l'humanité,¹ in which he deals with the problem of international law. While his remarks on this problem are not very extensive, they are worth mentioning because the theory of the law of nations is here considered from the viewpoint of the progressive concept of the global community.

The object of Laurent's eighteen-volume work as indicated in the Preface is to follow the progress of mankind toward unity.² According to Laurent this unity is characterized by the diversity of the groups existing within the global community. "There is in mankind an element of unity and an element of diversity. Nations are the element of diversity."³ Like human beings, nations have a distinct individuality.⁴ The diversity of nations is important for the fulfillment of mankind's mission, which consists in the perfection of human faculties. "For this goal to be attained the task must somehow be divided among the various members of the human species; whence the division of men into nations: each has its own office to perform in humanity's common labor."⁵ Isolated individuals living outside a national community would not be able to develop and perfect themselves. The division of mankind into nations, however, does not exclude its essential unity which results from the unity of its mission.⁶

The bond which unites the nations of the world must find expression in a universal law. If nations are comparable to individuals, then their intercourse is to be regulated by law, just as the intercourse of the individuals within a national community is regulated by a legal order.⁷ It may be objected that there can be no international law in the same sense as municipal law, because the international rules cannot be enforced like the legal order of a state. According to Laurent, however, the law of nations is not without a sanction, although the sanction has a different character from that of municipal law. Public opinion is supposed to assure the respect of the international legal order. "Public opinion has in modern times become a formidable power; no judicious person will deny its reality, for its strength is continually growing and the time is coming when neither individuals nor peoples will be able to resist it."⁸ ". . . It is an invisible power that dominates peoples—the power of ideas and sentiments."⁹ These ideas and

sentiments, which develop "under the influence of a progressive civilization," form "humanity's general conscience, which rules the world and will continue to rule it more and more."¹⁰

Progress, which is expected to produce a global legal order based on the principles of unity and natural diversity and supported by public opinion, according to Laurent, already has brought about some important effects. In the nineteenth century the nationality principle, completely disregarded in earlier periods, has triumphed over opposing forces in several cases;¹¹ and unity is beginning to establish itself among nations. "Thanks to a happy combination of circumstances, the extent of the relations among nations is constantly growing; the barriers erected between peoples by prejudice, opposing interests, and hostile beliefs are falling one by one."¹² However, Laurent considers the progressive development to be still in its initial stage. The nations are only beginning to form themselves, and the unity of mankind is still essentially a theoretical ideal.¹³

Under these conditions the international legal order necessarily is incomplete. "The elements of which future unity will be composed are still lacking. Nations are not yet constituted; how can we try to assign laws to them?"¹⁴ Therefore, "the science of international law still remains to be written."¹⁵ According to Laurent it is not yet possible to present a system of international law. The adherents of the natural-law school as well as the positivists have attempted to work out such a system, but in Laurent's opinion their attempts have been unsuccessful. While the natural-law theory is "pure philosophy" and does not pay sufficient attention to facts, the positivist doctrine does not consider the ideas which are to govern the universal legal order.¹⁶ In the positivist theory there is no room for the principle of unity: "international law really amounts to laying down the principle of national sovereignty, and deducing the consequences."¹⁷ The positivist thesis that only agreements can create legal ties between states amounts to a negation of the law of nations. For, according to Laurent, without a natural bond between nations there can be no international law.¹⁸

The inadequacy of the theory of international law here appears

to reflect the imperfect condition of the world. There can be no complete international legal order and, therefore, no theory expressing the unity of mankind because, in spite of its natural character, the bond uniting the nations of the world is not yet strong enough to keep the peoples together in a perfect legal community. Laurent finds himself in the typical situation of the progressive thinker who builds his theory of the global community on a concept of natural conditions but has to look to the future for the full realization of what is supposedly natural. In this respect the progressive differs from the adherent of the natural-law school. In the natural-law doctrine the rules derived from the nature of man are considered to be immutable; whether they are observed or not, they are always valid as ideal norms. The progressive thinker conceives of a legal world order which corresponds to natural conditions and, at the same time, constitutes an effectively working system of law; he expects this legal order to develop in the course of history as a result of mankind's steady advance toward perfection. Thus the universal legal community—which, according to the natural-law theory, has always been in existence—appears to the progressive internationalist to be in an early phase of formation. Laurent observes that, while the states have existed for many centuries, the idea of a legal community of mankind is relatively new. This situation is supposed to account for the fact that the global law still lacks the precision and authority of municipal law.¹⁹

The primitive character of the global legal order seems to make the legal situation in the universal sphere comparable to conditions which formerly have existed in smaller communities. This comparison is frequently made by progressive writers who wish to demonstrate that there already exists a global law although it still is incomplete, and that its transformation into a perfect legal order is the normal process through which legal systems develop in the course of history. Thus Laurent states that in the Middle Ages the individuals had the right to wage private wars; "the anarchy reigning today among nations is no greater than that which existed in the Middle Ages in individual relations."²⁰ In spite of its anarchical features, the feudal community of the Mid-

dle Ages was doubtlessly governed by law. Consequently, there seems to Laurent to be no reason for denying the existence of the global legal community which is still in its anarchical stage. Moreover, it appears to him safe to expect that this community will eventually become as orderly and peaceful as other communities are now, which in earlier phases of their development had been in a similar state of imperfection. This way of reasoning has become typical of progressive thought. There is, however, a fundamental difference between the smaller bodies and the global community. While in the case of these bodies the development led from primitive conditions characterized by the absence of a strong central authority to the modern state, the universal community, according to the progressive concept, is to perfect itself without ever being organized like a state.

Laurent raises the question whether an organization is necessary in order to lift international law above the primitive level. His answer is affirmative: "Since humanity is one, it must attain an organization that will allow it to fulfill its destiny."²¹ Laurent thinks, however, that under existing conditions it is impossible to work out in detail the principles of the future world organization.²² He defines this organization only in a negative way; it is not to be a world state. In such a state the nations would lose their sovereignty and independence. Mankind would become the only sovereign in the world.²³

According to Laurent a universal state is not necessary for the abolition of war: "War diminishes because of the natural progress of humanity, without the necessity of uniting all peoples in a single state."²⁴ The reasons which make the individual state an indispensable institution do not apply to the global community. "Considered as the guardian of public order, the state is a necessity for the coexistence of individuals; it is not a necessity for the coexistence of nations."²⁵ Laurent tries to explain this difference between individuals and nations in the following passage:

The state has to do with real individuals, with physical persons; it must have, in certain respects, absolute authority over its members, otherwise the coexistence of men would be impossible. This is why we say that citizens are *subjects*; they are, in fact, subject to a sov-

ereign power, that of the law. Does this hold for nations in their relations with humanity? It does not seem to us that it does. Nations are moral beings; in general there is no need of a superior authority to keep them within the limits of their duty; by the very fact that they exist—that is, that they are organized—they offer guarantees of order not presented by individuals. Civilization's advances are putting an end to international brigandage; for this no penal code is required, no tribunals, no police; whereas within each state, repressive justice is a permanent necessity which will not disappear through any advance of civilization. Every day crimes are committed, every day the life and property of individuals are threatened. Attacks on the existence of a nation are a rare accident in modern history, and one may boldly state that they will some day become impossible; the power of public opinion is enough to prevent them. There is, therefore, a profound difference between individuals and nations; the former have their vices and their passions which are continually leading them to do wrong; the others are fictitious beings whose agents are generally the most intelligent and most ethical men of their time. And even where intelligence and morality are lacking, public opinion contains them and will contain them increasingly within the limits of duty.²⁶

The world state as an instrument of compulsion, however, is not only unnecessary; it is also undesirable. According to Laurent, the analogy between nations and individuals is incomplete not only because the former can coexist without that type of organization which is indispensable for the latter's common life, but also because nations need more freedom than individuals.²⁷ Subjection to a common authority would weaken the specific characteristics of the various nations and thus would make them unable to make to the common work of mankind the particular contributions which correspond to their respective faculties.²⁸

Laurent doubts whether a world government can ever be strong enough to maintain in the global community the degree of peace and order which prevails in the national communities. But the world state would not be more acceptable to him if it were possible to establish a superstate with sufficient power to assume complete security throughout the world. On the contrary, he considers a completely effective world government to be absolutely incompatible with the character of the community of mankind. The following passage discloses the fundamental reasons of this view:

It may be held that world government will end up by being so strongly organized that all resistance will be impossible, and that the thought of resisting will not occur to nations any more than it occurs today to individuals. If that is the ideal of world monarchy, we protest vehemently against this ideal. Sovereign power, whose mission it is to safeguard the law may allow itself to be carried away, through the evil passions of those who wield it, to violate law. In that case resistance becomes a most sacred duty. It would be a sorry day for the peoples if they became subject to such a power that they lost even the notion of resisting it! Such a thing would mean humanity's end. Peace would reign on earth, but it would be a peace such as reigned under the Roman Empire—that is, slavery. We would a thousand times prefer the evils of the present organization, which at least makes resistance possible, to an organization that would give humanity the peace of the herd. This is a principal objection to world monarchy. All imaginable guarantees do not prevent the danger of violation of rights within individual states. Those who hold power are always ready to abuse it; what would happen then if the power of the human species were concentrated in a single state? That state would have instruments of power; would men who have the power of all mankind at their disposal be more inclined to respect the law than those with only the forces of a single government at their disposal? The answer is obvious; the human conscience replies: No, peace is not the supreme ideal of the human species; it is, after all, only a means. The ideal is law, justice; and the final weapon of violated law is insurrection. Let us bless the imperfection of our social state which allows us to have recourse to this ultimate means, for if the day should ever come when resistance becomes impossible, law would be nothing but a vain word; and if law were to perish, humanity would perish.²⁹

Laurent makes it clear that his objections to a statelike world organization apply to any superstate in whatever way it may be created and in whatever manner it may be governed. He is opposed to a universal state not only if it is established by conquest or has an oppressive government, but even if it is what he calls an "Etat humanitaire"—that is, a world state which respects the natural rights of nations just as the civilized modern state respects the unalienable rights of individuals.³⁰ It is the danger of the arbitrary use of power inherent in state government as such which makes a universal state undesirable. This unfavorable view of the state clearly conflicts with the faith in the increasing rationality of governments on which Laurent bases his hope that nations will

be able to coexist without subjection to a common higher authority. This conflict is inherent in the progressive assumption that state organization, although indispensable on the national level, is not necessary for the world community. States which can live together without being subject to a world government must be regarded as being or becoming generally capable of conducting their affairs in a completely reasonable manner. But since progress is not supposed to make it possible for individuals ever to coexist peacefully without an organization based on compulsion, the state necessarily remains an instrument of power and remains subject to the risk of the misuse of power. In this respect the state appears to represent an inferior type of unity, if compared to the global community, and the deficiencies of state government make its extension to the world undesirable.

In Laurent's opinion, a world state would be prejudicial to the liberty of mankind. So long as reason does not prevail in the world and governments do not generally observe reasonable standards of conduct, a people's struggle for freedom appears to be justified from the progressive viewpoint. Thus Laurent regards war as a legitimate weapon if it is used for securing the liberty and independence of nations,³¹ and he speaks of revolutions as of "great manifestations of divine justice."³² The division of the world into different independent states leaves room for such an assertion by force of principles of reason and justice when they are disregarded by governments. In this sense the absence of a world state is a guarantee of freedom and justice. A world state strong enough to make rebellion impossible would deprive mankind of the ultimate means of enforcing the observance of the standards of reasonable government. Even if in a universal state revolution were possible, it obviously would not have the same character as it has in an independent national community. It would violate the universal positive law; it could not be regarded as a procedure which, although illegal from the point of view of a particular legal order, may be legitimate in the light of principles of justice which unite mankind in a sphere of higher dignity than that of state government and of ordinary positive law created and enforced by a state. In a universal state this sphere of justice

and liberty would be eliminated. According to Laurent, not even the complete security could compensate for its disappearance. *Compared to the organization of the national community, the organization of the world is necessarily weak and in this sense imperfect. But, from the progressive point of view, this imperfection is an essential element of the particular dignity of the global community.*

Universal security and peace are to result not from the establishment of a world state but from mankind's progress, which is expected gradually to make the use of force unnecessary and to enable the nations to live together peacefully under the rule of a law which they establish by free consent in accordance with their true interests and with the universal standards of reasonable conduct. The unity thus arrived at will be of a higher kind than the unity created and maintained by the state. In this sense Laurent says:

There is a unity higher than any one based on and sanctioned by law and the power of enforcement associated with it; this is the unity that is founded on common beliefs, on common ideas and interests. Such is the unity toward which civilized nations advance. This unity may some day take on external forms, but it will not be a unity of coercion, such as the unity of the state; it will be based on the voluntary agreement of consent; it will be the result of contract and not of law. In other words, we believe that unity will be established by means of free association, an association which will leave the sovereignty of nations intact and will guarantee their independence rather than absorb it.³³

From this viewpoint, the attempts made in the past to achieve unity through a superstate appear to have been based on a false principle. Laurent mentions the Roman Empire and the papal monarchy of the Middle Ages as examples of such false unity.³⁴ He considers the medieval papal monarchy, which combined spiritual authority with political power, as a particularly unsatisfactory form of superstate.³⁵ The Reformation, the individualist reaction against this system of oppressive unity, has decisively contributed to the development of the situation which gave rise to the growth of the modern concept of a law of nations.³⁶ This situation, the coexistence of independent states, is not to be altered again by any future organization of the world. The international-

ist ideal of unity and peace evidently is strongly influenced by medieval concepts. In this sense it may be said that the progressive internationalist aims at the reestablishment on a universal scale of the unity which, to a certain extent, had existed in the medieval Christian community. But insofar as the papal monarchy had the characteristics of a superstate, the unity of the Christian world seems to have been brought about by inappropriate means. Thus, for the progressive thinker, looking back to the advances made on the road of progress, one of the most important events in the development of mankind appears to have been the breakup of the medieval system of unity supported by an organization which was in some respects similar to that of a state.³⁷

9

THE COMBINATION OF THE POSITIVIST THEORY OF INTERNATIONAL LAW WITH THE PROGRESSIVE CONCEPT OF A DEMOCRATIC UNION OF FREE NATIONS

LAURENT considered the positivist theory to be inadequate as a basis for the science of international law. The positivist theory of the legal community of sovereign states had grown out of the natural-law doctrine, which first had developed the idea that there was a legal order binding upon independent states. Since the progressive pattern of thought, of which Laurent's views were representative, had its basis in the natural-law idea that there exists a universal community governed by reasonable standards of conduct, both theories, the positivist as well as the progressive, could ultimately be traced back to the same source. But the two theories had developed in different directions. Consequently, certain principles which were essential elements of the progressive pattern of thought did not seem to have any legal significance in the domain of positive international law, which was supposed to be a law created by the states through common consent. In the positivist's view, for instance, the authority of states was legitimate whether they were nation-states or not. Their sovereignty entitled states to adopt any constitution they liked and to treat their subjects according to discretion.¹ There appeared to be no rule of positive international law generally preventing states from keeping up "protective duties to exclude or hamper foreign trade in the interest of their home commerce, industry, and agriculture."²

Nevertheless, the progressive concept exercised a decisive influence also on the positivists' way of thinking. This influence is

particularly evident in Oppenheim's case. Oppenheim in fact was a progressive thinker as well as a positivist. As a positivist he tried to present a system of international law corresponding to present state practice. The progressive concept determined his views on the trend and the goal of mankind's development. These views found expression, for instance, in the passage referred to above in which Oppenheim stated that the gradual realization of liberty and self-government was conducive to the welfare of the human race. The influence of progressive thought appeared most clearly in connection with Oppenheim's ideas concerning the growth of international law in the future. He laid down his ideas regarding this subject in a small book entitled *Die Zukunft des Völkerrechts*,³ which was first published in German in 1911, shortly before the second edition of his treatise on *International Law* appeared. The opinions developed in that book evidently were the result of a combination of the positivist doctrine of international law with the progressive concept of the global community.

This combination with legal positivism was not at all inconsistent with the general trend of progressive thought. The progressives expected the global community to become effectively governed by universal standards of reason. It seemed possible to assume that in the course of the progressive development the behavior of states would improve to such an extent that finally the rules derived from normal state practice by the methods of positivist legal science would be reasonable as well as positive. Furthermore, one of the goals of mankind's advance appeared to be the existence of an international legal order possessing the same precision and authority as positive municipal law. A positive international law, therefore, seemed even to be required by the progressive concept. But it was to be a positive law which, instead of reflecting unprincipled state practice, was in agreement with the natural conditions of general peace and order.

Oppenheim's international law of the future evidently is conceived of as a positive legal order of this kind. Its growth is regarded as being connected with the establishment of an international organization. The book on *The Future of International*

Law actually is concerned with the problem of organizing the international community. Oppenheim observes that international law can exist and develop without a permanent international organization. According to him, "it does not follow, however, that this society would not attain its aims better than in the past, if it were able to convert itself from an unorganized into an organized society."⁴ Writing half a century after Laurent, Oppenheim still feels, like that author, that it is impossible to present a concrete and detailed plan.⁵ But conditions seem to have changed since Laurent's time. In the Hague Peace Conferences of 1899 and 1907, and especially in the establishment of the Permanent Court of Arbitration, the beginning of a new development has manifested itself.⁶ On the basis of this development it seems possible to indicate at least the guiding principles of a future international organization.

Like Laurent, and for similar reasons, Oppenheim is absolutely opposed to the idea of a world state—that is, to an organization which would deprive the states of their sovereignty and equality and transform them into provinces of a supranational community. International organization seems to him acceptable only if it does not eliminate state sovereignty as "the highest earthly authority, which owes allegiance to no other power"; it is conceivable only as the result of the sovereign states' subjection to a self-imposed order which does not place them under any higher earthly power.⁷ "There can, therefore, be no talk of a political central authority standing above individual states; and so the organization in question must be *sui generis* and cannot frame itself on the model of state organization."⁸

Oppenheim no longer considers the establishment of a universal government to be practically impossible. "Whatever else can be urged against a universal federal state and the like, it is at the present day no longer a physical impossibility."⁹ Oppenheim thus expressly abandons one of the objections against a world state which Grotius and many writers after him had raised. His opposition to such an organization is based on the "conviction that the world-state is in no form practically useful or desirable."¹⁰ It has been shown above that Oppenheim regarded the

division of the world into sovereign states as a necessary, natural condition. It now appears that this condition is not natural in the sense that it cannot possibly change. It is natural because its modification seems to be inconsistent with the ideal situation which mankind is expected to realize. Thus Oppenheim declares:

All proposals for an international executive authority run counter not only to the idea of sovereignty, but also to the ideal of international peace and of international law. The aim of this development is not the coercion of recalcitrant states, but a condition of things in which there are no recalcitrant states. . . . It is just in this respect that the international community of states differs for all time from the community of individuals who are united into a state, the latter requiring as *ultima ratio* executive compulsion on the part of a central power, while the former consistently with its nature and definition can never possess such a central power.¹¹

Like Laurent, Oppenheim sees in the independence of nations an indispensable condition of the progress of mankind.¹² As a rule, a nation can develop successfully only in a state of its own.¹³ Oppenheim is convinced that the existence of independent nation-states is entirely compatible with the realization of unity through a steadily improving international legal order. His ideas on the advance toward such unity are typical expressions of progressive thought. According to him, "the progress of the law of nations is conditioned by the growth of the international community in mental strength, and this growth in mental strength in its turn is conditioned by the growth in strength and in bulk, the broadening and the deepening, of private and public international interests, and of private and public morale."¹⁴ The interests which Oppenheim has in mind here are primarily of an economic nature.¹⁵ In his opinion these interests are stronger than the elements which tend to obstruct the unity of the international community and the perfection of the international legal order. "The economic and other interests of states are more powerful than the will of the power-wielders of the day."¹⁶ Moreover, the general adoption of reasonable principles of government is supposed to change the conduct of state affairs. Oppenheim believes that modern institutions make the states so reasonable that, unlike individuals, they can live together peacefully without a common government.

Just as there will always be individual offenders, so there will always be individuals who only yield to compulsion. But states are a different kind of person from individual men; their present-day constitution on the generally prevalent type has made them, so to say, more moral than in the times of absolutism. The personal interests and ambition of sovereigns, and their passion for an increase of their might, have finished playing their part in the life of peoples. The real and true interests of states and the welfare of the inhabitants of the state have taken the place thereof. Machiavellian principles are no longer prevalent everywhere.¹⁷

Under these conditions the international community evidently can achieve peace and order while it remains a community of sovereign states. The freedom to use force, regarded as inherent in state sovereignty, does not imply disturbance of peace and order when reason prevails in the international sphere. States which are governed in accordance with liberal-democratic principles are expected to use their sovereignty to further the reasonable interests of their citizens, who, in the positivist's opinion, are themselves not members of the international community. The satisfaction of the real interests of the peoples seems to be assured when the states, as separate independent units, administer freely their internal affairs and regulate by consent matters of common concern to all nations.

The organization which Oppenheim proposes to create for the community of sovereign states has no executive functions to perform. It has two principal tasks: international legislation and international administration of justice. Oppenheim's idea of international legislation is based on his concept of lawmaking treaties.¹⁸ These treaties, distinguished from mere contracts between states, are supposed to create international law. If concluded by a great number of states, such treaties seem to provide a means of developing the general legal order of the international community. Thus this community appears to be able to fulfill legislative functions. The nineteenth century, however, "introduced international legislation only occasionally";¹⁹ there was no definite direction or method in the application of the legislative procedure,²⁰ and legislative conventions were adopted by only a limited number of states.²¹ Oppenheim suggests that international conferences

of the type of those held at The Hague in 1899 and 1907 be made a permanent institution, and that all member states of the international community be represented at these conferences. In order to achieve this aim, all states must conclude an agreement providing for periodic meetings of the legislative assembly. As a result of such an agreement, it will no longer be necessary to leave the convocation of a conference to the initiative of one or the other particular state. Oppenheim proposes that the states be summoned to the meetings by a standing international commission which would be given the task of preparing carefully the legislative work and of carrying out all other business entrusted to it by the conference.²² Oppenheim thinks that when these measures are adopted, there will "be evolved for the society of states a legislative organ corresponding to the parliaments of individual states."²³ Then "it will . . . be possible to say that the international community has become an actually organized society. . . ."²⁴

The activity of international conferences which adopt legal rules is regarded as legislative insofar as it constitutes a "conscious creation of law in contrast to the growth of law out of custom."²⁵ But Oppenheim admits that the term "legislation" is used here only "in a borrowed sense."²⁶ There is an essential difference between legislation within a state and international legislation. In a national parliament statutes are adopted by a majority vote of representatives of the people and the citizens must submit to the law enacted in this manner. Because of the principles of sovereignty and equality, however, no state can be bound by resolutions of an international conference to which it has not given its consent. In the international community majority decisions are, therefore, excluded as a method of creating legal rules of universal validity. The resolutions adopted by a conference must be ratified by the states before they can come into force.²⁷ The process of conscious lawmaking in the international sphere is, therefore, in fact only "quasi-legislative."²⁸

Oppenheim recognizes the difficulties inherent in such a process of lawmaking. He indicates, however, a method of overcoming some of them. He is certain that by avoiding "the inclusion in

a single convention of all the points under discussion" and by "dividing the topics of discussion among as many smaller conventions as possible," it will "always be found possible to secure the support of the greater number of states for the regulation of any given matter." ²⁹ In Oppenheim's opinion, the principles of sovereignty and equality do not prevent a majority of the states assembled at a legislative conference from adopting rules which are to be binding only as far as this majority is concerned. The law created in this manner does not bind the minority which has not consented to it. In Oppenheim's terminology, it is only *general*, not *universal*, international law. But Oppenheim thinks that he can find in history proof of the fact that "the general law of nations has a tendency gradually to become the universal law of nations." ³⁰ He has, therefore, no doubt that, once conventions have been adopted by a majority of the states represented at a conference, "in no long time thereafter the dissentient states will give in their adherence to these conventions, either in their existing or some amended form." ³¹ Universal acceptance of general rules concerning particular topics will finally make it possible to consolidate "several smaller laws in a single more comprehensive statute." ³² Thus the aim of the legislative procedure, the creation of a body of universal rules, will be achieved.

Oppenheim expects the states to collaborate in this way for the development of the international legal order because "the nature of the case and the conditions of international life call for concessions without which no progress would be practicable." ³³ He is obviously convinced that the general or universal rules adopted at legislative conferences generally constitute a "forward step" in the development of international law. ³⁴ The basis of this optimistic assumption is Oppenheim's belief that these rules will generally correspond to the true interests of the states, which at the same time are interests of the international community. His idea is that these interests will compel the states to agree on the regulation of certain matters, and that the states, having become more moral than they had been in the past under absolute rulership, will not resist the compelling force of their real interests. Not all states may always be ready at the same time to recognize the

requirements of progressive development, but it appears to Oppenheim safe to assume that, once a progressive proposal has been made, it will be adopted by a majority of states and will finally *find universal acceptance*. What from the viewpoint of particular states may appear as a concession made to other states will ultimately reveal itself as advantageous to the whole international community and consequently also to the members which make the concession. For the regulation resulting from the compromise will correspond to the "nature of the case" and to the "conditions of international life." Thus it can be expected that the rules enacted in the process of international legislation generally will have a reasonable character, and this reasonable character seems to assure the universal acceptance of these rules.

The product of conscious lawmaking through international conferences is supposed to be positive law, just as statutes enacted by legislative procedures within the various states are positive law. In Oppenheim's opinion there is a clear connection between the rise of the positivist theory of international law and the increasing quasi-legislative activity of the international community.³⁵ International legislation appears as a means of making the international legal order really positive and, to the extent to which the legal order acquires a positive character, a positive theory of the law of nations seems to become possible and necessary.³⁶

When Christian Wolff developed his theory of the volitional law of nations, which influenced the growth of the modern theory of international law, he regarded it as practically impossible for the representatives of all the states of the world to assemble for the purpose of adopting rules of universal validity.³⁷ He, therefore, conceived of a system of international law which, supposedly positive, in fact was derived from the states' presumed consent to rules of reason adapted to the conditions of human life. In modern times, meetings of the delegates of all states have become possible. At the second Hague Peace Conference forty-four countries, the great majority of all fully sovereign states, had been represented. The international community now seems to have become capable of establishing for itself positive rules, based on the actual

consent of all states, and of building up gradually a complete body of positive international law.

The quasi-legislative procedure appears to be appropriate not only for the regulation of matters that have not been governed by any legal rules but also for giving customary law a more precise form. So long as there are no universally binding conventions, the positivist has to regard custom as the only source of universal international law. But the contents of customary law are frequently not clear. The quasi-legislative procedure seems to make it possible eventually to effect a comprehensive codification of the whole law of nations which will result in a clear formulation of all its rules. Oppenheim thinks that the time is not yet ripe for such a codification,³⁸ but he evidently regards it as the ultimate goal of conscious lawmaking in the international sphere; for the purpose of international legislation, as conceived of by Oppenheim, is not merely the adoption, by as many states as possible, of multilateral conventions covering isolated matters of an international nature. Its real purpose is "the clear enunciation of legal rules for all international relations"³⁹—that is, the creation of a precise, complete, and coherent system of universal international law. The previous analysis of Oppenheim's positivist theory has disclosed the difficulties which the positivist had to face in his attempt to demonstrate, by strictly positivist methods, the systematic unity of the international legal order, which was supposed to depend on customary principles. When international legislation and codification have reached their goal, then the problem of the systematic unity of the law of nations will find its solution on the basis of indubitably positive rules. International law is expected to become as positive as the internal law of the national communities.

The international legal order, supposed to result from the legislative activity of the international community, however, would obviously be a positive law of a particular kind, a positive law raised to the level of a law of reason. It has been seen that the success of the quasi-legislative procedure depends on the compelling force of reason and of reasonable interests. This force alone can assure the constant unity of decision which is required

for the continuous development of international law through unanimous agreements. Oppenheim's whole concept of international quasi legislation is based on the assumption that the rules adopted through the lawmaking procedure will correspond to the reasonable interests of the states and of the international community. In this sense they will be standards of reasonable conduct.

The international law of the future, as conceived of by Oppenheim, therefore, would combine the characteristics of a positive law with those of a law of reason. Such a combination had already appeared in Wolff's theory of the volitional law of nations. But in this case it had an entirely different character. Wolff's volitional law showed the typical deficiencies of both the law of nature and of positive municipal law. As a law ascertainable only through deduction it lacked the precision and effectiveness of municipal law, while as a law adapted to existing conditions—that is, to the intellectual and moral weakness of human beings—it did not possess the elevated character of the strict law of nature. Oppenheim's concept of the international law of the future is determined by the progressive idea that the individual state is acquiring the rational qualities of the ideal man who is motivated solely by his real, reasonable interests. The rules on which states, as essentially reasonable beings, actually agree can be supposed to combine the best elements of a law of reason with those of positive municipal law. On the one hand, the future international law would form a body of rules as authoritative, precise and clearly defined as the statutes of a national community. On the other hand, this law would have the particular dignity of a true law of reason.⁴⁰

Unlike the natural law as conceived of by Grotius and his followers, the future law of nations would, of course, not be a set of eternal rules deduced by the scholar from the nature of man but a legal order consciously created in accordance with the conditions of the world, which are subject to changes in the course of history. The historical development, however, is expected to be invariably progressive and to lead mankind steadily nearer to the goal of complete correspondence between the conduct of state affairs and the natural interests of the peoples. Adaptation

of the legal order to the existing situation, therefore, does not mean, as in the case of Wolff's volitional law of nations, conformity to a state practice of doubtful moral value. The growth of the new law of nations is supposed to be determined by conditions which reflect mankind's advance toward increasing reasonableness and perfection.

The reasonable character of the rules adopted by the international community seems to assure their voluntary observance by the states which have freely consented to be bound by these rules. The international law of the future, therefore, can be expected to be as effective as the internal law of the states. In his treatise on *International Law*, Oppenheim declares that since the law of nations cannot be enforced in the same manner as municipal law, it is inevitably weaker than this law.⁴¹ The progressive development of the law of nations is not expected to change the character of the international community in such a way that it can enforce its law like a state. As far as its organization is concerned, that community therefore is to remain weak. But this weakness does not seem to imply that international law will never be properly observed. From the progressive viewpoint, it appears possible to assume that states will act in accordance with their legal rights and duties once they know exactly in every concrete case what these rights and duties are. As a method of clearly determining the law, administration of justice appears to be necessary in addition to international legislation. Oppenheim, therefore, considers international administration of justice as an essential part of the suggested organization of the international community. Although he asserts that law can exist without official administration, he recognizes that "in the long run, no highly developed legal society can dispense with it,"⁴² because it "gives law the certainty that its authority will in every case obtain operative effect."⁴³

The first Hague Peace Conference had resulted in the creation of the Permanent Court of Arbitration. The states which decided to set up this institution recognized arbitration as the most efficacious, and at the same time the most equitable, means of deciding disputes of a legal character, and in particular disputes regarding the interpretation and application of international treaties.⁴⁴

The Permanent Court of Arbitration was intended to facilitate the use of the arbitral procedure. It was, however, not a court in the proper sense of the term. The persons appointed as members were enrolled on a list from which the parties to a dispute selected in every particular case a number of arbitrators who were to form the arbitral tribunal. In Oppenheim's opinion, the creation of the Court of Arbitration has been of the greatest importance as far as the development of international law and of international organization is concerned. But he considers this institution alone insufficient as an instrument of administration of justice in the international community. He considers it necessary to establish a real court of justice in addition to that institution.⁴⁵

According to Oppenheim, there are the following differences between administration of justice through a court of justice and the arbitral procedure. "An arbiter, unless the terms of the reference otherwise provide, decides *ex aequo et bono*, whilst a judge founds his decision on rules of law and is only applied to on legal issues."⁴⁶ Arbitral tribunals "have in view a compromise rather than a genuine declaration of law."⁴⁷ Furthermore, "it is a fundamental part of the idea of arbitration that in every case the choice of the arbiters as men in whom the parties have confidence should be left to the parties themselves, whilst it is fundamental in the conception of a court that it is once and for all composed of judges appointed independently of the choice of the parties and permanently to adjudicate upon matters of law."⁴⁸

Because of the tendency of arbitrators "to furnish . . . a decision which is as far as possible satisfactory to both parties,"⁴⁹ there is in arbitration an element of political compromise which is incompatible with administration of justice in the strict sense of the term. Only a real court can fulfill the tasks of international administration of justice. Moreover, the composition of a real court and its duty to base decisions exclusively on legal rules appear to secure continuity of jurisprudence, which can be expected to further the growth of international law.⁵⁰ In Oppenheim's opinion, "nothing can heighten the respect in which international law is held more than the existence of a real international court."⁵¹ He therefore regards the establishment of such a court as indis-

pensable, and he evidently hopes that, once it is set up, decisions by this court will gradually become the normal way of solving differences between states.

Oppenheim does not propose to eliminate arbitration as a method of settling international disputes. He thinks that there are cases for the solution of which an arbitral award is more appropriate than a decision on strictly legal grounds. He therefore wishes to preserve the Permanent Court of Arbitration besides the proposed court of justice, and he suggests that the parties to a dispute should be free to choose between these two institutions.⁵² Thus, he hopes, every dispute that cannot be settled by other peaceful methods will be solved by a body of impartial persons, either by an arbitral tribunal or an international court. Oppenheim does not accept the idea that there are differences between states which, because of their character, cannot be solved at all by an international tribunal. That idea had found expression in a number of arbitration treaties concluded in the first years of the twentieth century. These agreements provided for settlement by arbitration of disputed legal questions, but only insofar as these questions did not touch the vital interests, the independence, or the honor of the parties. These factors were supposed to give the dispute a political character. It was, therefore, assumed in these agreements that there was a special category of legal disputes which were to be settled by arbitration, but there seemed to be no objective criterion of the legal or political nature of a conflict. The fact that the vital interests, the independence, or the honor of the parties were involved was supposed to make a dispute political, even when it was primarily concerned with questions of legal interpretation. Every conflict, therefore, was potentially political, and when it had actually become political, the dispute appeared to be absolutely unsuitable for submission to an international tribunal and, in fact, for any other solution than one arrived at on the basis of the relative political strength of the states concerned. The idea, however, that with regard to every dispute certain factors could exclude the possibility of a legal decision was hardly compatible with the progressive concept of the international legal community. According to the progressive

idea, the true interests of a state could not be in conflict with the general interest of the international community, which required a peaceful solution of international conflicts. Considering the question from the progressive viewpoint, Oppenheim cannot see any reason why states should not become accustomed to having all their disputes decided by an international tribunal. "The man who is not a victim to prejudice asks the reasonable question, why should vital interests and the independence and honour of states necessarily be withdrawn from the domain of judicial decision? If individuals in a state submit themselves to the judge's sentence, even when their vital interests, their honour, their economic independence, aye, and their physical existence are in issue, why should it be impossible for states to do the same?"⁵³ The ideal condition, as conceived of by Oppenheim, is reached when there exists an international court and when this court applies "the rules of the law of nations to disputed cases in the same way in which the courts of a state apply the rules of municipal law to disputed cases arising within the state."⁵⁴

In the absence of organized compulsion, the success of international administration of justice ultimately depends on the willingness of the states to submit their disputes to the court of justice. Oppenheim does not expect any serious difficulties to arise in this respect. "Any one who contemplates international life and the relations of states to one another, without prejudice and with open eyes, will see quite clearly that, when once there exist international courts, states will voluntarily submit a whole series of cases to them. These will, at first, admittedly, be cases of smaller importance for the most part, but in time more important cases will also come to them, provided that the jurisprudence developed in them is of high quality, and such as to give states a guarantee for decisions at once impartial and purely jural and free from all political prepossessions."⁵⁵ It seems possible to expect that the states will be irresistibly compelled by their interests to submit their disputes to the court. For the "peaceable adjustment of state disputes is in the interests of the states themselves" because "war is nowadays an immense moral and economic evil even for the victor state."⁵⁶ Oppenheim admits that the creation of an

international court is an "unheard-of experiment."⁵⁷ But he thinks that this experiment should not be delayed by "petty considerations based on the weakness of humanity and doubts as to the sincerity of the efforts of states to submit themselves voluntarily to international tribunals."⁵⁸

If it is possible to assume that states will voluntarily submit their controversies to an international court, then they can also be expected voluntarily to accept the court's decisions. Oppenheim is convinced that the same interests which compel the states to submit their disputes to the court will compel them to respect its awards.⁵⁹ Organized compulsion of the type used within a state for the execution of a court's decisions is not only unnecessary but would also be inconsistent with the nature of the international community and with the fundamental principle of national sovereignty "so long as no other power is entrusted with the execution of the awards of the international tribunal—that is to say, so long as submission to any such award rests always and entirely on the voluntary submission of the state concerned."⁶⁰

If, however, it happens that a state refuses to accept an award of the court, then, Oppenheim thinks, all states which took part in the court's establishment have the right to intervene.⁶¹ He evidently assumes that in such a case the states will act in their own reasonable interest, which coincides with the interest of the international community in the peaceful settlement of disputes. Oppenheim obviously does not consider compulsion of this type to be incompatible with the sovereignty of the state which has not accepted the award. But the future organization obviously can work satisfactorily only if the necessity of compulsion gradually disappears.

The success of the international organization suggested by Oppenheim ultimately depends on the voluntary observance by the states of reasonable rules of conduct. International legislation and administration of justice are supposed to make the international community similar to the national community as far as peace, security, and the reign of law are concerned. But international legislation is only quasi legislation, and international administration of justice differs from national administration

of justice as much as quasi legislation differs from real legislation. In the absence of a central authority with power to enforce its decisions, the institutions of which the future international organization is to consist can serve no other purpose than that of making it easier for the member states to follow a reasonable course of behavior. Periodical quasi-legislative conferences are supposed to offer the states an opportunity for arriving at universal agreements on rules corresponding to the reasonable interests of all peoples. The existence of international tribunals is expected to facilitate the voluntary observance of the reasonable principle which prescribes the peaceful settlement of international disputes.

Oppenheim assumes that, as the result of continuous legislation and administration of justice, the international community will become steadily more legal and correspondingly less political in character. The conditions are supposed to change which have made the law of nations "rather a diplomatic than a legal branch of knowledge."⁶² Diplomacy is concerned with politics; political activities are motivated by consideration of power and expediency, and therefore seem to have a character of arbitrariness. Oppenheim evidently believes that this element of arbitrariness will gradually disappear when more and more matters of international concern become legally regulated.

In his description of what he considers the existing law of nations, the freedom of political action which the states enjoy by virtue of their sovereignty is emphasized to such an extent that the existence of a coherent system of legally binding international rules appears to be questionable. The principle of sovereignty seems to be inconsistent with the concept of a precise and completely binding international law. For sovereignty is supposed to give a state the right to disregard the fundamental rules of that law whenever the state itself considers observance of these rules to be incompatible with its essential national interests for the protection of which it is exclusively responsible. When, however, because of their increasing reasonableness, the states generally recognize what their true interests are and when they are inclined to use their freedom of action only in a man-

ner consistent with these interests, then sovereignty does not appear to constitute an obstacle to the firm establishment of the rule of law in the international sphere. Through international legislation and codification the sovereign states can be expected eventually to build up a comprehensive and coherent body of positive international law which will precisely determine the course of action to be adopted in every concrete case and, therefore, will leave no room for arbitrary political activities.

At the beginning of the twentieth century, progressive students of international law were convinced that the sphere of international politics was steadily transforming itself into a sphere of international law. A few years before Oppenheim's study on *The Future of International Law* was published, O. Nippold, for instance, observed that a new international law was developing which had an essentially nonpolitical character.⁶³ He found evidence of this law in the increasing number of multilateral agreements regarding matters of a nonpolitical nature. In the past, international agreements had been mostly treaties of peace and alliances which were predominantly political. In Nippold's opinion, however, political matters did not lend themselves easily to legal regulation. Rules concerning such matters necessarily were themselves more political than legal, and political affairs in fact belonged to the domain of the states' foreign policy rather than to the sphere of international law. Thus the older international law actually was nothing but an instrument on which the politicians used to play.⁶⁴ The growth of a real legal order in the international community appeared, therefore, to depend on the increasingly nonpolitical character of the relations between states. It was supposed that there existed matters which by their nature were nonpolitical and that these matters were bound to become more and more important in the international sphere.

Considering the development of international law from a similar viewpoint, Oppenheim expects this law to grow until it governs the international community in the same manner in which the national community is governed by municipal law. There is, however, in his concept an essential difference between international and municipal law as far as the importance of political

factors and their relationship to the legal order are concerned. While in the past there appear to have been in the international sphere less law and more unrestrained political activity than within the state, the ideal goal of the progressive development can be reached only if in the international community the political element becomes less important than it is in the national community.

From the time when the idea of a law binding upon independent states was first developed, these states, in their relation to the international community, have frequently been compared to the citizens of a national community. In this analogy, which obviously influenced Oppenheim's way of thinking, the states appear in the role of private citizens who establish legal contacts with one another, and the international legal order is similar to private law in the sense of a law regulating the private relations between citizens and defining their rights and duties arising from such relations. Rules of private law were in fact extensively used to formulate, by analogy, principles of international law. Private law, however, constitutes only one part of the legal order of a state. There exist also legal rules concerning the relations of individuals with the state and, especially, rules regarding the organization and conduct of government. These rules, constituting the body of public law, regulate to a large extent matters of a political nature. To that extent the purpose of the legal order is to control political activity which in itself is recognized as legitimate. In the modern state the process of lawmaking itself is characterized by political struggle carried on in accordance with legal rules which guarantee an orderly procedure. The particular character of a national legal order is determined by political decisions arrived at through legally defined processes. In the international organization, as conceived of by Oppenheim, there exists no public law because there can be no political activities as they are carried on within a state.

Unlike the state, the international community, even when organized, is not a political body. It does not have a policy of its own in the same sense as the state has a policy. There is, therefore, in that community no room for political struggle regarding

the formation and execution of such a policy. In the absence of a central government the international organization cannot control political activity aimed at the maintenance or acquisition of power and its use for securing particular advantages for an individual state. The ideal which is expected to be realized in the future, therefore, is not legal regulation of political action but rather the complete absence of politics from a sphere which has always been the particular field of political activity.

The international organization provides merely a machinery designed to facilitate such reasonable behavior as is necessary for maintaining harmony between independent political bodies. Such an organization can be expected to fulfill its tasks only if the international community is kept together by the nonpolitical interests of its members. According to Oppenheim, "much, if not all, depends on whether the *international* interests of individual states become stronger than their *national* interests, for no state puts its hand to the task of international organization save when, and so far as, its international interests urge it more or less irresistibly to do so."⁶⁵ The struggle between international and national interests⁶⁶ obviously implies a conflict of viewpoints regarding the best way of satisfying a state's interests: the international, reasonable, legal viewpoint on the one hand, and the national, political viewpoint on the other. International interests appear to become stronger than national interests when the force of circumstances compels the individual states to realize that an increasing number of interests can be better satisfied by a reasonable regulation acceptable to all other states than by isolated action motivated by the selfish desire for immediate special advantages; "national chauvinism, to which the existence of a law of nations is hateful, and which represents unlimited national self-seeking" is one of the most serious obstacles to progress. It makes international conflicts unavoidable and prevents their settlement by judicial authorities.⁶⁷ The international organization of the future is not intended to deal with problems arising from policies motivated by selfish national interests; its functioning depends on the disappearance of such policies.

In addition to national chauvinism, Oppenheim mentions

among the obstacles to progress the fact that "individual states are subject to a perpetual process of evolution, and thereby to perpetual change. . . . No state is permanently assured against break-up, and it is the break-up of existing states and the rise of new states that threaten the permanent organization of the international community of states with danger." ⁶⁸ These political events are dangerous for the international organization because the organization has no means of coping with them. To Oppenheim this situation seems to be of particular importance because the perpetual change in the condition of states necessarily results in the instability of "the political equilibrium, on which the whole law of nations rests." ⁶⁹ The idea that certain power combinations constitute the extralegal basis of the international legal order seems to be more or less consistent with the character of the present law of nations as Oppenheim describes it in his treatise on *International Law*. But one may have assumed that Oppenheim considers these political elements to be important only in an early phase of the development of international law. It is obvious, however, that actually he does not expect any change in this respect; in his opinion, the international law of the future will also depend on the existence of a balance of power. This opinion evidently conflicts with his general concept of the future law of nations and of the forces which support it. The political equilibrium presupposes "natural jealousy" between states and antagonistic political interests. These interests are fundamentally different from the reasonable interests which, uniting the peoples of the world, are expected to compel the states to create a universal law and to submit their disputes to tribunals even when their very existence is in issue. Oppenheim clearly recognizes the difficulties arising from the fact that the international organization and the international legal order have no control over the political conditions on which their effectiveness is supposed to depend. He hopes that these difficulties will eventually be overcome. According to his own concept of progress, however, this hope can be regarded as justified only if it is possible to assume that political factors, and especially the balance of power, will gradually lose their importance.

Politics cannot completely disappear from the international sphere so long as the international legal community is not universal. According to Oppenheim's positivist doctrine, full membership in that community is limited to civilized states, and the relations between members and states outside the community are not, or not completely, regulated by international law. Progress, however, is supposed to make universal the type of civilization which is a condition of membership.⁷⁰ Thus it may be hoped that the international law of the future will acquire world-wide validity in the course of history.

The progressive development of the law of nations is supposed to modify the role of the science of international law. For a long time, according to Oppenheim, the law of nations had been essentially a book law formulated by scholars.⁷¹ The natural-law concept had decisively influenced the growth of that law. Now international legislation and codification, together with international administration of justice, are expected to make international law so positive that, just as municipal law, it will present itself to the scholar as an independently existing object of scientific investigation; he no longer will have an opportunity to determine its contents according to his own concept of justice and reason.

The possibility of such a development, however, is still a theoretical problem which is to be solved by the scholar. Oppenheim declares that the progress of international law depends to a great extent upon whether the legal school of international jurists, which "desires International Law to develop more or less on the lines of Municipal Law," prevails over the diplomatic school, which "considers International Law to be, and prefers it to remain, rather a body of elastic principles than of firm and precise rules."⁷² General adoption of a theoretical concept here appears to be a condition of progress. The two schools obviously represent different theories regarding the character of international law and the possibility of its future development. The concept of the "legal school" is that of the progressive positivist who believes to have proved that there exists a positive legal order governing the intercourse between independent states and that,

through an organization which leaves the states' independence intact, the international legal order can become similar to a system of positive municipal law. The positivist's theory of the existing law of nations, however, actually is based on ideas borrowed from the natural-law school, and his progressive views regarding the future development of that law rest on the assumption that there exist standards of reason which will guide the states in the conduct of their affairs. Thus, thinking in terms of natural law in fact determines the concept of the future as well as of the present condition of the supposedly positive law of nations.

In Oppenheim's opinion, the first Hague Peace Conference has marked the beginning of the development leading to the firm establishment of the universal rule of law.⁷³ It is difficult to derive from his writing a clear idea as to the time in the future when the goal of this development will be reached and an international organization of the type suggested by him will be able to work successfully. In this respect, expressions of unbounded optimism alternate with skeptical remarks emphasizing the slowness of progress. But the general trend of mankind's advance appears to be clear. In the concluding sentence of his study on *The Future of International Law*, Oppenheim says: "we must move onward, putting our trust in the power of goodness, which in the course of history leads mankind under its propitious guidance to ever higher degrees of perfection."⁷⁴

PART THREE

THE LEAGUE OF NATIONS CONCEPT

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THE FIRST WORLD WAR AND THE RISE OF THE LEAGUE OF NATIONS

THE FIRST WORLD WAR seemed absolutely to disprove the ideas of all those who had put their trust in the power of goodness. Neither this power nor that of reason, which was supposed to demonstrate the universal advantages of peace, had been able to prevent the outbreak of the conflict. Economic factors had failed to bring about unity between civilized states. On the contrary, these factors had strengthened the political antagonism existing in the world. The growing tension had finally resulted in a war which seemed to constitute the general triumph of passion over reason.

But in the course of the war the conflict appeared to acquire a definite meaning which made it possible to interpret the struggle in the light of the progressive pattern of thought. The war was considered to have been started by the Central Powers, whose policy was dominated by a spirit of aggression and conquest. It was thought that these powers had followed such a policy because of their imperfect form of government. Germany particularly seemed to have been subject to autocratic rule and to have been dominated by a small group of ambitious men who were able to deceive their own people.¹ Austria-Hungary's internal situation appeared to have been characterized by the oppression of nationalities which wanted to be free from foreign rule. The assassination of the Archduke Franz Ferdinand, the immediate cause of the outbreak of the war, was an event directly connected with the struggle for freedom of oppressed nationalities. Disregard of the nationality principle and autocratic government, two factors which progressive thinkers always had regarded as obstacles to permanent peace, seemed to have dem-

onstrated their evil effects beyond any doubt.² The optimistic view of prewar thinkers who had assumed that reasonable conditions of government had already been realized, or would be gradually realized in a manner of orderly progress, had proved incorrect. But it seemed possible to expect that the victory of the Allies would bring about such conditions once and for all and that thus the war would prepare the way for permanent peace. The idea that a last catastrophe precedes the fulfillment of the expectations of a better world is a characteristic element of millennium dreams. In the same sense the millennium promised by the apostles of progress could be thought of as the goal of a struggle which was to be the last war, waged for the final elimination of autocracy and oppression. Its dimensions, which made it possible to speak of a world war, lent to the conflict the world-wide significance which was necessary to make it appear as a decisive turn in the history of the human race.

In the course of the war more and more states had joined the countries first engaged in the conflict with the Central Powers, until these were confronted with an overwhelming combination of power. If the global conflict were regarded as the result of an act of aggression committed in a spirit of conquest against some members of the international community, the gathering of stronger forces against the aggressors could appear as a manifestation of the solidarity of mankind: "the conscience of mankind was shocked by what Germany did."³ In the face of the wrong done to some of its members, practically the whole international community seemed to have reacted spontaneously, because the whole community was interested in the defeat of the disturbers of the peace and in the extermination of the forces which made a lasting world order impossible. Particularly, the participation in the conflict of the United States could be interpreted as an action undertaken in the general interest, for the "salvation of mankind," rather than in the immediate national interest of this country.⁴ From this point of view the war was not only waged for just cause by those allied against Germany and her satellites, but it was also a common action undertaken by the international community as a whole in the general interest which

was affected by the disturbance of the peace resulting from aggression and conquest. By waging a victorious war against the aggressors, the civilized world enforced its fundamental rules of conduct. Thus the great conflict no longer appeared as a meaningless struggle between two groups of states for the maintenance or acquisition of power. On the side of the Allies the war seemed to have a definite meaning in the light of the progressive concept of the global community.⁵ While in itself the war was a catastrophe, it appeared to be a means of overcoming the last obstacles which in the past had prevented the maintenance of general peace and order, and, although it had disrupted the unity of the world, it could be regarded as evidence of the solidarity of the greater part of mankind, which was opposed to war and aggression.

The World War, however, seemed also to have demonstrated that an international organization was required for the maintenance in the future of a lasting peace based on the solidarity of the peoples of the world. At the outbreak of the war Germany did not foresee the reaction which her policy of aggression and conquest was to provoke. It seemed possible to argue that peace could have been preserved in 1914 if there had been an international forum which, after an open discussion, would have expressed the world's opinion regarding the conflict and its causes. In the speeches delivered on his western tour in September 1919, President Wilson constantly expressed the view that the war would have been averted if the conflict had been submitted to an international conference.⁶ He assumed that public discussion of the German case would have shown that it was a bad case; in the face of general disapproval, Germany would not have executed her plans.⁷ She would certainly not have dared to start the war if she had known that the world would use its combined forces against her.⁸ To secure a lasting peace after the catastrophe, an international organization with a permanent machinery for the settlement of international disputes seemed therefore to be indispensable. The member states were to be bound, before going to war, to submit every conflict either to settlement by an international tribunal or to inquiry by a permanent body of

the organization. Force was to be used against any member that disregarded this obligation. Just as within the individual state order and security ultimately seemed to depend on the combined strength of the citizens, so the combined strength of the members of the global community appeared to be required to maintain the peace of the world.

The methods traditionally used for the preservation of peace had proved to be not only worthless but also dangerous. Experience seemed to have shown that the balance of power resulting from a system of alliances always was of a precarious nature and that the efforts to establish and to maintain such a balance inevitably led to war. Power combinations within the global community led to the formation of hostile blocs with antagonistic political interests. Such combinations were, therefore, incompatible with the principle of unity which was to govern the new world order. Only combined action, which could be regarded as being undertaken on behalf of the whole world community under the guidance of the public opinion of mankind, seemed to be consistent with that principle.⁹ An international organization providing for such action was supposed to produce conditions of security comparable to those existing within a state.

The similarity between the national communities and the global community, however, was not to be complete. The new organization was not intended to transform the world into a superstate. The international sphere, therefore, was not to lose the particular character which had always distinguished it from the domain of the states. The structure of the global community as a community of independent states remained essentially unchanged. But the spirit of international cooperation, which was to govern the new organization, was expected to change fundamentally the nature of the relations between independent states. Before the war, state practice in general had been neither reasonable nor moral. It was believed, however, that the war had brought about a decisive change in the moral condition of the world. The common fight for the cause of democracy and peace was supposed to have given the moral forces of the world a new

impulse which was expected to outlast the war and to raise mankind permanently to a higher level of morality than that which had prevailed in 1914. The horrors of modern warfare appeared to have convinced the peoples, as well as the governments, that the old type of policy which had led to such a catastrophe was to be definitely abandoned. A fundamental change of mind seemed to have taken place throughout the world.¹⁰ It could, therefore, be hoped that in the future the behavior of states would be governed by standards of conduct entirely different from the principles which had been followed before. According to Wilson, the new spirit had manifested itself in the drafting of the conditions of peace. He declared that the peace treaty was "a people's treaty" and the first people's treaty ever concluded.¹¹ The statesmen who drafted it had realized that "they did not have the right to follow the line of any national advantage in determining what the settlements of the peace should be, but that they were the servants of their people and the servants of the people of the world."¹² "For the first time in the history of international consultation men [had] turned away from the ambitions of governments and [had] sought to advance the fortunes of peoples." They had "turned away from all those older plans of domination and sought to lay anew the foundations for the liberty of mankind."¹³ Thus the peace settlement was the "first attempt ever made by an international congress to substitute justice for national advantage."¹⁴ These statements may not constitute a correct description of the peace negotiations. But they express in a typical manner the new spirit which was supposed to have come into the world and which was to determine the work of the League of Nations, whose Covenant was incorporated in the peace treaties.

Before the war the policy of national selfishness seemed to have found its theoretical justification in the concept of sovereignty, which the science of international law had developed under the influence of the positivist school.¹⁵ Of particular importance in this connection was the sovereign states' freedom to go to war whenever they pleased. Whatever the progressive positivists' views regarding the law of the future might have

been, they had made it clear that the existing general law of nations did not restrict the freedom of the states in this respect. It was commonly believed that German theorists were particularly responsible for the development of the concept of unrestricted and irresponsible sovereignty and that that concept had decisively influenced Germany's policy which had finally resulted in the great conflict. The World War taught mankind that such a concept was incompatible with the peaceful development of the human race. It was not felt simply that it had become necessary to replace some previously valid legal rules, which had proved unsatisfactory, with new and better provisions. It was rather assumed that the whole prewar theory regarding the legal relations between states had been incorrect and that the war had brought to light the true principles of international conduct which ought always to have been observed.

These true principles were in fact not new. The fundamental principle of the new legal order was the rule that states should not go to war without having tried peaceful methods for the settlement of their disputes. The analysis of Wolff's natural-law theory has shown that this rule had its origin in the natural-law doctrine. The new tendencies of the theory of international law clearly implied a general return to natural-law ideas. It was a return not only to Wolff but, beyond him and Pufendorf, to Grotius, the "father of international law." Pufendorf's and Wolff's theory, which represented the states as single persons coexisting in a condition of natural liberty, had resulted in a concept which strongly emphasized the states' independence of one another and their interest in their own preservation and welfare. Its pronounced individualistic elements distinguished this concept, which decisively influenced the later development of the science of international law from Grotius' theory of the community of mankind—a theory which stressed the idea of universal unity and solidarity. Insofar as the World War seemed to have demonstrated the existence of world-wide solidarity, it appeared possible to say that Grotius' spirit had become manifest since August 1914.¹⁶ It was to become the spirit of the new organization, the spirit of Geneva. The organization was not in-

tended to deprive the states of their independence. But it was assumed that in the future sovereignty somehow would have to be exercised in a less rigid and exclusive manner and that the new international legal order would determine the rights and duties of the states in accordance with their close interdependence and with their needs of mutual assistance and cooperation.

Grotius' idea of universal solidarity seemed to have found clear expression in his theory regarding war as a means of enforcing the universal law. As far as law enforcement in the global community was concerned, the similarity between Grotius' concept and the ideas underlying the new world regime appeared to be particularly evident. Grotius regarded the ruler of an individual state as entitled to use force for the maintenance of the universal legal order, even when his own interest was not directly affected by the breach of law. An unlawful act was to be recognized as such by all members of the global community. There was therefore no neutrality—that is, no impartiality in the case of an action undertaken for the punishment of a violation of the universal law. While everyone was authorized to support such an action, nobody was allowed to help the wrongdoer; not even a previously concluded treaty of alliance could give a state the right to assist another state whose cause was not just. Thus, universal solidarity was the basis of a method of law enforcement which made the global community appear to be similar to a state insofar as the universal law was enforced by persons who could be regarded as the community's agents. It is not necessary to explain to what extent it was possible to regard this theory as a model of the new regime to be established after the World War.

Under the new regime, however, only those rules were to be enforced which limited the states' freedom to go to war. It was assumed that, if peace were preserved, all other problems arising in the international community could be solved satisfactorily. The organization to be set up after the World War was designed to offer the states the opportunity of settling disputes which were not submitted to international tribunals—that is, of disputes of a political nature. Sanctions were regarded as necessary only if a

state went to war in disregard of certain definite rules regarding the prevention of war. The application of this criterion of unlawful conduct seemed to make it possible for the states to arrive at a uniform judgment regarding the applicability of sanctions in a concrete case. The states' common interest in peace appeared to assure uniformity of action whenever a case requiring the application of sanctions was ascertained.

Grotius' merely theoretical idea that the universal law could be enforced through states acting on behalf of the global community thus was expected to become a reality. Grotius had formed the rules regarding this subject by a process of scientific investigation; now the question of sanctions was regulated by the written provisions of an international treaty. The return to natural-law concepts of course did not imply the rejection of positive law as such; it meant that the new legal order, precisely formulated in agreements, was to be based on principles of reason and justice.

The League of Nations organization was intended to maintain reasonable and just conditions in the world. With the establishment of this organization the development which had begun when the unity of Western Christendom was dissolved appeared to have come to an end. International unity was finally restored on a world-wide scale through an organization which was endowed with an authority of a higher kind than that of the political bodies into which the international community was divided. The League was in fact nothing but an association of independent states, which consented "to limit their complete freedom of action on certain points for the greater good of themselves and the world at large."¹⁷ But this association of states was considered to represent something more than the sum of its members, namely, the community of mankind. This idea was made possible by the assumption that, in the performance of their common tasks, the states would be guided by the public opinion of mankind, the highest nonpolitical world authority which was independent of and superior to the states. The satisfactory working of the organization seemed ultimately to depend on the power of public opinion. "Throughout this instrument

[the Covenant of the League],” President Wilson said in the Plenary Session of the Peace Conference, February 14, 1919, “we are depending primarily and chiefly upon one great force, and that is the moral force of the public opinion of the world, the cleansing and clarifying and compelling influences of publicity.”¹⁸ The open discussion of international problems before the League’s various bodies was expected to make it easier for public opinion to form its judgments on matters of general concern.¹⁹ Secret treaties were no longer allowed. From now on the world public was to be kept fully informed of all events in the international sphere so that the conscience of mankind could properly exercise its authority.

If one examines the new situation that was expected to arise after the World War, it appears to be difficult to determine the most important element of that situation. Was it the creation of a machinery designed to maintain the peace of the world, or the higher morality which had developed as the result of the war experience, or the clearer understanding of the nature of international law? The advocates of the League evidently considered all these factors to be of equal importance and hoped that, together, they would bring about a better world. It is impossible, however, to combine in a consistent concept the various assumptions on which this hope was based. The League of Nations concept rested on ideas which clearly were conflicting and incompatible with one another.

The League of Nations idea obviously was the product of progressive thought.²⁰ It was decisively influenced by the progressive concept of a completely peaceful world community. But the League was also the direct result of the World War, and this event considerably modified the progressives’ manner of thinking. The traditional progressive concept had never been a wholly consistent theory. The League of Nations idea, however, was even less consistent in itself than that concept.

When, before the war, Oppenheim made suggestions regarding an international organization, his fundamental belief was that in the course of progress mankind and the states would ultimately become perfectly reasonable. This belief made it possible

for him to expect that the global organization would not have to deal with political problems because they would automatically lose their importance in the international sphere, and that the peoples of the world would live together peacefully under the rule of a complete and precise international law, which for its effectiveness would not require any legal means of compulsion. Thus Oppenheim's views of the global organization of the future reflected the highest possible degree of optimism. But Oppenheim did not expect all the conditions on which that organization's successful functioning depended to be fully realized in the near future. After the war the establishment of an international organization of a different type seemed to have become necessary as well as possible. The war appeared to have demonstrated the necessity of a machinery through which it was possible to deal with political conflicts. Experience was believed to have shown the ineffectiveness of a global legal system which did not provide for law enforcement through the combined power of the world community. In this respect the League concept was based on the pessimistic assumption that in the international community there would always exist unreasonable behavior which would lead to political conflicts implying the risk of war. Since, however, the League was not a world state, the new organization ultimately still had to depend for its successful working on the reasonableness and the good will of the states. These factors alone could guarantee the preservation of peace; they alone could assure general participation in the common action which was to constitute the sanction of the rules regarding the prevention of war. Like the organization suggested by Oppenheim, the League was only a machinery facilitating reasonable conduct in international affairs.²¹

Under these circumstances, the satisfactory functioning of the new organization was possible only if the conditions of perfect reasonableness and morality, the realization of which Oppenheim had expected in a distant future, were already realized. For this reason it was of the greatest importance that, as the result of the war which had eliminated autocratic governments and had created a new spirit of universal solidarity, the world seemed

to have become more moral and more reasonable than it had ever been before. This change appeared to justify the hope that political combinations such as alliances would become useless and that in the future the security which the states previously had sought in such combinations would result from the threat of a common action against any disturber of the peace, an action in which any state was supposed to take part regardless of its own political interests. But the community in which this legal, nonpolitical method of compulsion was considered feasible appeared to require such a means of coercion because there was a constant risk of political disturbances among the same states which were expected, if necessary, to act together as guardians of the peace of the world. Thus the League concept was based on different assumptions which were not compatible with one another. The idea that a special machinery for the prevention of war was necessary implied the pessimistic assumption that the world's condition still was far from being perfect. But without the optimistic assumption that reason and good faith prevailed in the world, it could not be hoped that the new regime would work. It may be said that, as far as the prevention of war was concerned, the League's successful functioning depended on conditions which, if they had existed, would have made the organization unnecessary.

It may be recalled in this connection that Pufendorf had considered international treaties to be useless in which states agreed to maintain peace in accordance with the rules of the law of nature.²² So long as there was no superstate it seemed to him impossible to create greater security in the international sphere by agreements, the observance of which depended as much on reason and good faith as the respect for natural law. In a community in which the reasonable behavior of independent states was the ultimate condition of peace, such agreements were unnecessary when reasonable behavior actually prevailed, and they were useless when the states were not conducting their affairs in a reasonable manner. The statute of the new world organization could appear to be a treaty of the type which Pufendorf had in mind, insofar as its provisions were intended to assure the ob-

servance of reasonable principles regarding the maintenance of peace among the peoples of the earth. Progressive thinkers who, unlike Pufendorf, believed in the perfectibility of the human race could ask why it was necessary to create such an organization which was to rely on the use of force, after a war supposed to eliminate the last obstacles to permanent peace and to establish reasonable conditions in the world. This question was actually raised, for instance, by Secretary of State Lansing in a letter addressed in April 1918 to Colonel House.²³ Discussing the aims of the League to Enforce Peace, Lansing declared that "the acceptance of the principle of democracy by all the chief powers of the world and the maintenance of genuine democratic governments would result in permanent peace."²⁴ He went on to say: "If this view is correct, then the effort should be to make democracy universal. With that accomplished I do not care a rap whether there is a treaty to preserve peace or not. I am willing to rely on the pacific spirit of democracies to accomplish the desirable relation between nations, and I do not believe that any League relying upon force or the menace of force can accomplish that purpose, at least for any length of time." From the traditional progressive viewpoint, the new organization could appear not only as unnecessary but even as a step in the wrong direction. Thus, for instance, Mr. Elihu Root, speaking of the League of Nations in October 1920, declared that the world could not "be made good by compulsion" and that the "only line of progress was through the growth of the moral qualities that make for peace."²⁵ According to progressive thought as it had developed during the nineteenth century, the ideal situation toward which mankind was supposed to advance was characterized by the complete absence of conditions which could cause the use of force in the international sphere. The return to Grotius, which implied the acceptance of the doctrine that law enforcement was an essential element of every legal order, could therefore appear to the orthodox progressive as a negation of the progressive ideal.

The League of Nations concept in fact presupposed the simultaneous existence of two different sets of conditions which corresponded to different phases in mankind's assumed advance toward

perfection. It has been seen above that progressive thinkers, attempting to demonstrate the trend of human development, opposed the "true" reality of the oneness of the world to the "false" reality of a disunited world. In a similar sense the League of Nations concept seemed to imply the idea of two realities. On the one hand, it was recognized that the unity of the global community still was disrupted by political conflicts which were the result of the antagonistic interests of states; under these circumstances the prevention of war constituted the most important international problem. On the other hand, the League was expected effectively to deal with this problem as if the peoples of the earth, united by nonpolitical interests, already had reached a degree of moral perfection and reasonableness which assured their peaceful coexistence.

THE IDEA OF COLLECTIVE SECURITY

ARTICLE 11 of the League Covenant ¹ contained the following statement: "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League." ² These words expressed the progressive thinkers' assumption that any disturbance of the peace is prejudicial to all nations alike and that all peoples of the world have an equal interest in general peace. This was one of the reasonable, natural interests which were supposed to keep the various peoples of the world together and to unite them within a global community. It was now proclaimed that the reasonable, natural interests, which in the past had often been disregarded, were the actual interests of the member states of the League. This proclamation meant that the League existed as a unit with concerns of its own. For in the absence of a central authority of the type existing within states the solidarity of interests was the uniting element of the organization. The situation cannot be compared to that existing within a national community when a matter previously unregulated is made the subject of a new statute and thus becomes a matter of general concern. In this case the national community is already in existence and simply adds a new provision to the set of rules which constitute its legal order. Neither is the situation similar to the formation of a federal state. In this case the unity of the new entity finds expression in a central authority; the common interests here only provide the motives which lead to the creation of the federal bond. In the case of the League, the solidarity of reasonable interests was and remained the only basis of the community's legal order, which consisted of rules creating rights and duties for independent states. The legal order could be regarded as effective only if that solidarity existed.

But since, in the past, states had been guided by considerations of narrowly interpreted national advantages, and since there was to be no fundamental change in the external situation which had produced this evaluation of national interests, the declaration contained in Article 11 was more than the statement of a fact. The international solidarity appeared as a goal which was still to be attained and which the states were obliged to reach. From now on each state was expected to act on the assumption that its reasonable interests—that is, the general interests of the community—actually were its real interests and that all the other members of the community regarded their respective interests in the same light.³

In accordance with the principle that any war was a matter of general concern, Article 11 provided that in a situation threatening the peace of the world the League should take any action that might be “deemed wise and effectual to safeguard the peace of nations.” The most important rule laid down in the following articles was the provision that a state, going to war against another, without submitting the dispute to arbitration or judicial settlement or to the Council, or without waiting until three months after the award of the arbitrators or the judicial decision or the report of the Council, should be deemed to have committed an act of war against all other members of the League.⁴ These were immediately to break off all relations with the guilty state and resort, if necessary, to the use of armed force against the lawbreaker. The same sanctions applied if a state resorted to war against a state complying with an arbitral award, a judicial decision, or the recommendations concerning the settlement of the dispute which were agreed upon by all members of the Council not parties to the dispute.⁵

The Covenant did not prohibit war in all circumstances. But the League was established to make another general conflagration impossible. The provisions of the Covenant could be considered appropriate to achieve this purpose if certain assumptions were made. The first assumption was that blind, unreasonable passion was the main source of wars.⁶ If this view were correct, the delay which the members of the League had undertaken al-

ways to observe before going to war could be expected at least *considerably to diminish the danger of armed conflicts by giving the parties to a dispute the opportunity to consider the case more calmly—that is, in the light of reason.*⁷ The idea that war resulted from unreasonable passions implied the further assumption that all international conflicts could find a reasonable, generally acceptable, solution through peaceful means. *The Covenant offered to the members of the League such peaceful methods of settlement.* Disputes likely to lead to a rupture between two states, which were not submitted to arbitration or judicial decision, could be brought by one of the parties before the Council of the League which was to try to end the dispute by an agreement between the parties. The Council had no power to impose a settlement. But if its efforts to bring about an agreement were unsuccessful, this organ was to make a report containing, besides a statement of the facts, “just and proper” recommendations with regard to the settlement of the dispute, and, if this report should be adopted by the delegates of all members of the Council not parties to the conflict, a war against the party complying with the recommendations was prohibited. The Covenant took account of the possibility that the delegates of the states not directly involved in the dispute could not adopt a unanimous report on its settlement.⁸ But it was hoped, of course, that this case ordinarily would not occur. Unanimity was required in principle for all decisions of the main League organs, the Council and the Assembly; “this requirement of unanimity, which safeguarded the sovereignty and equality of the member states of the League, was not expected to create serious practical difficulties. The official British Commentary to the Covenant declared in this regard: “Granted the desire to agree, which the conception of the League demands, it is believed that agreement will be reached, or at least that the minority will acquiesce.” The conception of the League indeed demanded not only the desire to agree, but also the certainty of an agreement which existed only if a reasonable, “just and proper,” and therefore generally acceptable, solution were available for every dispute. A satisfactory working of the League regime obviously required that it generally appeared clearly who was right and how

a dispute was to be settled, and that an organ composed of the impartial representatives of states not involved in the dispute generally would be able to find this solution. This requirement again could be fulfilled only if mankind, whose just opinions the League organs were supposed to express, was united by a general spirit of justice and reasonableness undisturbed by considerations of national power and politics. Otherwise an open discussion of international conflicts by a conference of state representatives could not only not produce the expected beneficial effects, but even result in a further complication of the international situation. The opportunity to bring their grievances before an international forum could induce states to magnify their quarrels and to provoke an international discussion of cases which otherwise might not have arisen at all or might have been settled quietly between the parties directly concerned. In a politically divided world such a discussion could lead to the extension of isolated conflicts and to the accentuation of existing general differences between opposing blocs of states.

Under such circumstances the League obviously could not fulfill its task. Without a fundamental unity of opinion and will, it was also impossible to enforce the Covenant's provisions concerning the prevention of war. If, however, that unity existed, it could be expected that the sanctions provided for in Article 16 would generally not be necessary.

Within a world governed by evident common standards of reason and justice, breach of the law, always easily recognizable as such, necessarily was an isolated phenomenon. If in an exceptional case a violation of the peace of the international community occurred, it could be expected always clearly to appear as the result of irrationality and bad faith.¹⁰ The maintenance of peace thus was considered to be essentially a matter of reason and good will. The moral cohesion of the world was believed to be so strong that even a state which, under the influence of irrational passion, contemplated going to war against another would not be entirely insensitive to the voice of reason, especially if it were clearly expressed by an impartial international organ, but would be prevented from executing its plans by the moral disapproval of

the global community. In this sense President Wilson said at the Plenary Session of the Peace Conference of February 14, 1919: "throughout this instrument [the Covenant] we are depending primarily and chiefly upon one great force, and that is the moral force of the public opinion of the world, the cleansing and clarifying and compelling influences of publicity."¹¹ He expected that sinister designs, if drawn into the open, would be "promptly destroyed by the overwhelming light of the universal expression of the condemnation of the world."¹² Wilson went on to say: "Armed force is in the background in this programme, but it is in the background, and if the moral force of the world will not suffice, the physical force of the world shall. But that is the last resort because this is intended as a constitution of peace, not as a League of War."

It was hoped, of course, that the fear of collective action would generally discourage a state contemplating a resort to war in violation of the Covenant. But even use of the physical force of the world against the lawbreaker did not necessarily mean war. In its first paragraph, Article 16 provided for economic sanctions, for a complete economic isolation of the disturber of the peace; the experience of the World War seemed to have demonstrated the irresistible power of this weapon. It was assumed that it would be "as terrible a weapon as was the papal excommunication in the Middle Ages."¹³ Like excommunication, boycott was supposed to produce a profound spiritual effect on the lawbreaker. Here again the idea of the moral bond uniting mankind appeared very clearly. It was believed that it was especially the moral isolation resulting from it which made the economic sanction irresistible.¹⁴

The second paragraph of Article 16 mentioned military sanctions. But according to an opinion which soon became dominant, there existed no legal obligation to take part in them. As the British Commentary stated, the contingents to be used against the lawbreaker actually were to be settled by agreement;¹⁵ according to the Commentary, this procedure was necessary if the spirit of the Covenant were to be preserved and if joint action were to be efficacious. Participation in the economic sanctions was considered compulsory in the case of a breach of the Covenant. But it was

left to each member of the League to decide whether such a breach actually had occurred.¹⁶ Also, this principle, that the states were free to decide for themselves whether the case had arisen in which they were obliged to apply the sanctions, seemed to be in agreement with the spirit of the Covenant; to invest the Council with the power to give a decision binding on all members of the League would not have been consistent with these members' sovereign rights.¹⁷ It was assumed, of course, that the members of the League would always arrive at the same conclusion with regard to the fact of a breach of law, which was expected generally to be evident to all reasonable persons, and that they would fulfill their obligations arising from that fact. Only on this condition was an effective combined action certain, and only the certainty of such action could have the effect of deterring from the execution of his plans the prospective disturber of the peace who was not amenable to reason.

The sanctions provided for in the Covenant were intended to make the global community similar to a state insofar as the enforcement of the legal order was concerned. The obligation of all League members to participate at least in the economic sanctions seemed to be an important element in this transformation of the global community. When previously a combined action of the members of this community against a disturber of the peace was contemplated, participation in this action generally appeared as the exercise of a right. The use of combined force against a violator of the legal order was regarded as a war waged for just cause. Christian Wolff's concept of a common action undertaken in the interest of universal security was an example of this view. It has also been seen above that Oppenheim spoke of a right of intervention which, he supposed, belonged to all states in case the award of an international tribunal was not accepted by one of the parties. It was assumed that the states would exercise this right because their reasonable interests would induce them to do so. Although the Covenant of the League seemed to introduce a fundamental modification of the concept of collective law enforcement, the change was more apparent than real. According to Article 16, a member of the League that resorted to war in dis-

regard of the provisions of the Covenant was *ipso facto* deemed to have committed an act of war against all other members of the League. This formula expressed the idea that every unlawful war, although immediately directed against a single member of the community, also directly affected the interests of all others. The act of war committed against them entitled all the states to use force against the lawbreaker.¹⁸ There existed no means of forcing them to exercise this right, and there was in this respect no distinction between economic and military sanctions. The distinction made between these two kinds of sanctions became still less important if, as was the case according to Wilson's interpretation of the Covenant, the members of the League were not legally but morally obliged to take part in the combined action of a military character,¹⁹ and if, as Wilson explained in this connection, a moral obligation were superior to a legal obligation and had "a greater binding force."²⁰ Whether the members of the League applied the economic as well as the military sanctions ultimately depended on their good will, and this good will could be expected to exist only if the members were reasonable enough to regard their interests as directly affected by a war in which they were not immediately involved.

If it were possible generally to rely on the good will and reasonableness of states, then the provisions of the Covenant could seem to be sufficient for an effective prevention of war. It could even appear doubtful whether so detailed provisions were necessary for the achievement of this purpose. It should have been possible to expect, if the world were in the condition which alone enabled it to preserve general peace, that it would always be easy in a case of emergency to convene a conference for the consideration of a dispute not submitted to arbitration or judicial settlement, and that a state contemplating war without laying its case before an international organ or in defiance of the decision or recommendation of such an organ would be restrained from executing its plans by the fear of the collective action in which all the states, motivated by their own reasonable interests, would certainly participate. If, on the other hand, that condition did not exist, no additional undertakings of the member states could possibly make the League better qualified to fulfill its task of preventing war. No greater

security would have been achieved if war, or at least offensive war, had been entirely prohibited, if the Council had been given the right to issue a binding decision instead of a mere recommendation, if the unanimity principle had been abandoned, if there had been precise clauses providing for the execution of the decisions of international organs, and if the member states had been obliged to make military contingents available to the League for the enforcement of its legal order. The maintenance of the legal order of the League thus "strengthened" would in the last resort also have depended on the good faith of the member states. The idea of "strengthening" the Covenant was clearly inconsistent with its basic premise. On the one hand, this idea presupposed the necessity of imposing more rigid obligations on states which otherwise could not be trusted to live together peacefully; on the other hand, it had to be assumed that the same states would generally be willing to fulfill heavier duties with regard to the enforcement of those obligations without any possibility of enforcing the enforcement.

For the same reason it was impossible to regard the League Covenant as a first phase in the development of international organization. A greater perfection in the machinery of the League was not necessary if the moral conditions existed on which its functioning depended, and, if these conditions were not fulfilled, no machinery was likely to give the world greater security. Therefore, the League could appear as initiating a new phase in the development of international relations only in the sense that the new era was to be one of increased rationality and morality. But unless a high degree of rational and moral conduct were already reached, the League could not be expected to work at all. Its functioning presupposed that the behavior of the member states was ordinarily motivated by considerations of reasonable interest rather than by considerations of power and politics. Of particular interest in this respect is a statement of the official British Commentary to the Covenant which is to be found in a passage dealing with the Permanent Court of International Justice set up under Article 14 of the Covenant. The League Covenant did not impose on the member states any binding obligation to have their conflicts decided by arbitral or judicial organs. But in Article 13 they agreed to submit

to such organs any disputes which they recognized to be suitable for this kind of settlement, and the same article enumerated certain classes of disputes which were to be regarded as generally suitable for submission to arbitration or to the Permanent Court of International Justice. In this connection the British Commentary expressed the following opinion: "As things now stand, the political rather than the judicial aspect of the settlement of disputes is prominent in the Covenant, but 'political' settlements can never be entirely satisfactory or just. Ultimately and in the long run, the only alternative to war is law, and for the enthronement of law there is required such a continuous development of international jurisprudence, at present in its infancy, as can only be supplied by the progressive judgments of a Permanent Court working out its own traditions." The concept of the ideal condition of the world which appears in this passage obviously is very similar to the idea of the unpolitical sphere which was expressed by progressive writers before the first World War.²¹ The author of the Commentary must have considered the political settlement of a dispute—that is, especially the settlement through the action of the League Council—to be more satisfactory and reasonable than its decision by war. But he regarded such a settlement as still imperfect, and the existing situation, in which the political aspect of international conflicts was prominent, appeared to him as not entirely consistent with the ideal of a League of Nations governed by law. Since political settlements were the natural consequence of political disputes, it appears that the ideal League was to be free from conflicts of this type.

It was, however, precisely the existence of such conflicts which had led to the idea that a League of Nations was required for the maintenance of peace between states. Such an organization seemed indispensable, just because the ideal situation, characterized by peaceful intercourse and voluntary compliance with international law, was not realized. The passions of the world were not dead.²² By providing for the creation of an international legal court, the Covenant fulfilled an old hope of progressive thinkers. But its characteristic new feature was the machinery which it set up for the settlement of political disputes²³ and the prevention of war.

To prevent the outbreak of hostilities between states, the provisions of the Covenant seemed generally sufficient, although the right to go to war was not entirely eliminated but only restricted. But by simply limiting that right, the Covenant obviously admitted that war was a method normally used by states to enforce their claims. In fact, the primary reason for not prohibiting war entirely was that such a prohibition seemed impracticable under the existing circumstances. According to General Smuts, the utmost that it seemed "possible to achieve in the present conditions of international opinion and practice" was "to provide for a breathing space before the disputants are free to go to war."²⁴ He expressed what he declared to be the general opinion in the following words: "states will not be prepared to bind themselves further; and even if they do, the risk of their breaking their engagements is so great as to make the engagement not worth while and indeed positively dangerous."²⁵ The situation thus described considerably differs from that which seemed required for a satisfactory working of the League. This difference is made still clearer by Smuts's observation concerning the political disputes—that is, the conflicts from which wars had generally resulted and for which the Covenant attempted to find a peaceful solution. In cases of this kind, according to Smuts, the issues "are generally vague, intangible, and spring from special grounds of national psychology. They involve large questions of policy, of so-called vital interests, and of national honor."²⁶ When political disputes arose, passions ran high, "not only among the disputants, but also their partisans among other states."²⁷ The global community here appeared as at least potentially disrupted into hostile blocs composed of states which considered their vital, essential interests as opposed to those of other states. From the progressive point of view this situation might have seemed to result from the fact that the states had not yet reached that highest degree of reasonableness which would have enabled them to realize that there was no antagonism between their real interests and especially that they had in common the most vital interest, that of peace. But it was this fact which made it necessary to create a machinery for the prevention of war. On the other hand, as seen before, the satis-

factory working of this machinery presupposed the existence of a community characterized by an essential unity of reason and good will, a unity at worst occasionally broken by isolated cases of unreasonable behavior. With this concept of unity, which was a fundamental element of the League of Nations idea, conflicted the other equally essential concept that there was a special category of political disputes.

Smuts's idea of political conflicts corresponded to that expressed in a number of prewar arbitration treaties by which the contracting parties agreed to settle by arbitration all such differences of a legal nature as did not affect their vital interests, their independence, or their honor. Lord Robert Cecil, who together with General Smuts represented the British Empire at the League of Nations Commission of the Peace Conference, obviously shared this concept. In his opinion even the interpretation of a treaty, which apparently was a matter most suitable for decision by judicial procedure, could involve the honor or the essential interests of a country and thus become the subject of a political dispute which could not be settled by legal decision.²⁸ According to this view, there existed no precise distinction between legal and political disputes. This difficulty was one of the reasons for which it seemed impossible to establish in the Covenant the principle of compulsory jurisdiction for disputes in themselves susceptible of legal decision. It has been seen above that Oppenheim thought it unreasonable to exempt from judicial settlement questions involving essential interests. The state practice of the period after the first World War followed him insofar as it no longer used the concept of political conflicts that at the end of the war had still been maintained by Lord Robert Cecil and General Smuts. The reservations concerning the vital interests and the honor of the countries no longer appeared in the instruments by which states obliged themselves to have their disputes settled by a legal decision, and they were especially absent from the undertakings of a considerable number of them to accept the compulsory jurisdiction of the Permanent Court of International Justice. But compulsory jurisdiction generally was accepted for legal disputes only, and in this respect the regime differed from that envisaged by Oppenheim,

who had hoped that ordinarily all international differences would be submitted to judicial organs. The distinction between legal and other disputes still was maintained. But it still proved impossible to arrive at a precise definition of the two categories.²⁹ If, as was supposed, the global community were united under a global system of law, it should have been possible to solve every question in accordance with a legal rule. If extralegal considerations could give a conflict such a character as to exclude the possibility of judicial settlement, there was no objective legal criterion left according to which the question could be answered as to whether the obligation to submit all legal disputes to a judicial organ applied to a particular case. But whatever definition of nonlegal or nonjusticiable disputes might have been attempted, it was usual to refer to them as political conflicts or conflicts of interests, and the controversies which could not be brought under the control of law were regarded as those which were most likely to disturb the peace of the world. Since a state ordinarily does not use force in cases of minor importance, it was therefore still true that nonlegal disputes were those involving "large questions of policy" or "vital interests." Thus the distinction between legal and nonlegal conflicts meant that states still generally had essential political interests of their own which could bring them into conflict with other states. This condition, however, was hardly compatible with the assumed existence of a fundamental unity of interest which guaranteed the maintenance of peace through the machinery of the League and under the guidance of a uniform public opinion.

Progressive thinkers believed that the expansion of international administration of justice and the corresponding contraction of the sphere of politics was simply a question of increasing and perfecting the body of international law. The League appeared to be particularly qualified to further this development. It was supposed to perform its task of promoting international cooperation and achieving international peace and security "by the firm establishment of the understandings of international law as the actual rule of conduct among nations."³⁰ It seemed possible to expect that the new organization would help to bring about a comprehen-

sive codification of international law and that the existence of a complete system of rules which precisely defined the legal rights and duties of states would facilitate lawful conduct within the global community and decrease the sphere of politics. But international legislation—that is, the process of establishing rules by consent—could be expected to lead to the creation of such a complete system only if it were possible to assume that their essential interests would be regarded by all the states as generally coinciding. This assumption was contradicted, however, by the recognition of the fact that states had, at least in their own opinion, essential interests of their own, which were not necessarily in agreement with those of other states and which could not even be defined precisely enough to make the establishment of a purely legal sphere possible.³¹ As long as this situation prevailed, it could hardly be expected that a complete codification of international law would be possible and that the elimination of the political element would be achieved by the process of lawmaking. If it had been possible to eliminate it, the League's war-preventing machinery would have become correspondingly unnecessary.

In fact, the political element and the power factor were so important in the League that it appeared necessary to take account of them in the composition of the Council. On this organ, which particularly was concerned with the task of preventing war, the Great Powers were permanently represented while other states, selected for membership on that body by the Assembly, occupied their seats only for limited terms of office. As the British Commentary explained, the Council had to represent "the actual distribution of the organized political power of the world" if it were to "exercise real authority."³² Although in form the Council's decisions were only recommendations, it seemed likely to the author of the Commentary that recommendations made unanimously by a body of delegates of states including those of the Great Powers would be "irresistible." There the importance of the relative political strength of the members of the League was openly recognized to an extent which to some seemed incompatible with the principle of state equality. It may be recalled that Oppenheim had considered the hegemony of the Great Powers as a political fact

without legal significance. As far as the composition of the League Council was concerned, the preponderance of the Great Powers was not, as had been the case previously, merely a matter of political practice; it was confirmed by a rule embodied in an international treaty. As a body deriving its authority at least partly from the representation of the Great Powers, the Council was particularly qualified to function as an instrument of collective mediation and dictatorial interference in the conflicts arising between weaker states. Pufendorf had conceived of an action of this type as a method of maintaining peace.³³ This concept seemed somewhat out of place in that writer's theory, in which the world appeared as a wholly unpolitical community of free and equal persons coexisting under the exclusive rule of the law of nature and reason. In the League of Nations, which was supposed to represent the combined moral and physical power of the whole world and to exclude political combinations supported by the power of particular states, the recognition of the predominant power of some states should also have seemed incompatible with fundamental concepts. It is true that the Great Powers represented on the Council were supposed to act in the interest of the whole world community. The power of the strong was to maintain the right of the weak.³⁴ Moreover, the delegates of the Great Powers were not alone sitting on the Council, and that body was expected to fulfill its tasks under the general control of the Assembly, in which all members of the League were represented. Nevertheless, the special position which the Covenant granted to the Great Powers by making them permanent members of the Council could easily appear as a concession made to existing political conditions and thus involving a deviation from the pure League of Nations idea.

But such a concession could hardly be considered to be an expression of sound realism if the primary purpose of the League were kept in mind. In this regard the following remarks by D. H. Miller, the legal adviser to the American Commission at the Peace Conference, are significant: "To suppose the existence of a League of Nations and at the same time a war between its members is to suppose an unreal impossibility. Of course, I am

speaking of serious things. Haiti and the Dominican Republic might, I suppose, go to war and a League go on. But a world war, a war of Great Powers and a League of Nations of these same Powers with the rest, are contradictory in their essence.”³⁵ The significance of this statement will become clear if one considers the general opinion with regard to the condition of the world as it existed during the nineteenth century after the close of the Napoleonic Wars. This period appeared as generally peaceful; the political situation then prevailing seemed to justify the hope of progressive thinkers that the institution of war was becoming obsolete. There were, however, wars throughout the nineteenth century; some of them involved even Great Powers. But there was no general conflagration of the type of the Napoleonic Wars or the first World War. The League was established primarily in order to prevent the recurrence of catastrophes of such dimensions. They resulted from the antagonism between Great Powers which finally led to the disruption of practically the whole world into two hostile blocs. But the League seemed not to be qualified for dealing with such emergencies. Its functioning depended on a constant agreement of the Great Powers—that is, on a condition the absence of which would have made its working particularly necessary. It certainly was a success when the Council prevented a border incident between two small states from developing into a real war. But it can hardly be said that by effecting a success of this kind the League achieved the main purpose for which it was created. This purpose clearly was the prevention of another World War. The struggle of 1914 to 1918 was to be the last of its kind. It was hoped, of course, that general agreement on international problems would exist not only between the Great Powers but throughout the world, and this hope could seem justified because of the changes in the general situation which were to take place after the war. If, as was expected, the war resulted in eliminating once and for all the conditions which in the past had provoked international conflicts, then it seemed possible to believe that in the future the peoples’ reasonable interests, and especially their natural interest in peace, would be free to assert themselves. In this respect there appeared, therefore, to exist a certain rela-

tionship between the peace treaties which created new conditions and the League whose Covenant formed the first part of those treaties. But here again the idea that the international community organized through the League was united by a bond of common reason and good will conflicted with considerations of a political nature.

The new territorial settlement was to be based on the principle of self-determination—that is, on the rule that every nation's reasonable desire to live together in a separate independent unit was to be respected. In doubtful cases the plebiscite was considered to be the appropriate method of ascertaining the wishes of the population of a given territory.³⁶ The creation of the League of Nations seemed to make it possible to realize the principle of self-determination to the fullest extent. Without this institution it might have appeared necessary to establish boundaries between states in such a way as to facilitate their defense.³⁷ But in Article 10 of the Covenant the states belonging to this organization undertook to respect and preserve, as against external aggression, the territorial integrity and existing political independence of all members of the League. Supplemented by the provisions regarding the peaceful settlement of disputes and the prevention of war, this article was supposed to give security even to those states whose boundaries, drawn in accordance with the nationality principle, were unfavorable from a strategic point of view.³⁸

It is not intended here to decide whether the peace treaties were just or to what extent the establishment of European frontiers actually was determined by the rigid application of the pure principles of nationality and self-determination. But it must be observed that even if it had been possible objectively to determine what absolutely just conditions were, such conditions could be created only at the expense of the conquered states and could, therefore, hardly be equally acceptable to the whole world. The guarantee against aggression, which the League provided for its members, was therefore bound to appear as a guarantee of the results of victory, and the common interest on which the League's functioning depended became an interest of the victorious powers not so much in peace as such as in the maintenance of the con-

crete political situation created by the peace treaties. The war had led to entirely new political conditions, especially insofar as the position of Germany in Europe and in the world was concerned. Germany had lost her ally, the Austro-Hungarian Monarchy, which completely disappeared through dismemberment, and was herself decisively weakened. This effect of the war could appear as justified in the light of the progressive concept on which the League of Nations idea was based. The Austro-Hungarian Monarchy had to disappear because its existence was incompatible with the principle of self-determination, and Germany was to be weakened because she seemed to have proved her innate tendency toward aggression and conquest and her disregard for the rights of other peoples. If this judgment of the German character were correct, if a strong Germany were a menace to the security of other states, then it could have seemed that a policy designed to keep Germany in a position of comparative weakness and to maintain a certain power situation as a safeguard against future German attacks was not in itself inconsistent with the League's ideals of peace and order in the international domain. It is irrelevant here whether the premises of such a policy were correct or whether it could have been carried out successfully. The fact is important, however, that when member states tried to use the League as an instrument of maintaining the political conditions created by the peace treaties, their policy could be criticized, not because it was bad, but because it was a policy. It was possible for critics of the institution simply to denounce it as the "Entente League of Nations" without investigating the merits of "Entente" policy. Writers could demonstrate their moral and intellectual boldness merely by revealing to a startled public the fact that political activities still were carried on in the world. From the point of view of the pure League idea, it seemed difficult for states which, as League members, had a policy of their own to answer this kind of criticism. According to this idea, the League had no policy of its own and was not compatible with a policy of its members based on particular interests and special power combinations, although this organization seemed to be required because of the danger to world peace resulting from politi-

cal conflicts which could arise only if there existed a diversity of essential interests.

The Covenant itself contained a provision which clearly showed that the League was not intended to be connected with any particular political situation. This provision was Article 19 which ran as follows:

The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable, and the consideration of international conditions whose continuance might endanger the peace of the world.

According to the British Commentary, this provision made it plain that the Covenant was "not intended to stamp the new territorial settlement as sacred and unalterable for all times, but, on the contrary, to provide machinery for the progressive regulation of international affairs in accordance with the needs of the future." The Commentary added that "absence of such machinery, and the consequent survival of treaties long after they had become out of date, led to many of the quarrels of the past"; the new regulation thus seemed "to inaugurate a new international order, which should eliminate, so far as possible, one of the principal causes of war." One of the main purposes of Article 19 was to provide for the readjustment of frontiers in such a way as to make it impossible that under Article 10 the members of the League should be obliged to defend against aggression boundaries which were drawn unjustly, especially in disregard of the wishes of the populations concerned.

This concept very clearly reveals the conflicting ideas underlying the League of Nations and its Covenant. The fact was recognized that territorial disputes frequently had caused wars in the past. The provision of the Covenant, designed to eliminate wars resulting from this source, was based on the assumption that the general opinion of the world, as expressed by the delegates of all the members of the League in the Assembly, would be sufficient to induce a state voluntarily to give up parts of its territory whenever its right to rule them appeared no longer compatible with the requirements of justice. The working of the new "machinery" depended on the possibility of objectively determining an unjust

territorial settlement and on a change in the attitude of states with regard to territorial problems. The meaning of this change is illustrated by a clause which appeared in one of the several drafts of a Covenant prepared by President Wilson. Although this sentence was not inserted in the Covenant as finally adopted, it nevertheless is characteristic of its spirit. It was said there: "The Contracting Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary." ³⁹ In the framework of the Covenant, which guaranteed the territorial integrity of the member states against outward aggression, this clause could only mean that from now on the states would neither individually nor collectively defend at the risk of war boundaries which were obviously unjust. While, therefore, the new machinery seemed necessary since states were inclined to go to war because of a difference of opinion as to the justness of territorial settlements, the functioning of this machinery could be expected only when this condition no longer existed. The Covenant thus did not really provide for a solution of the problem which it intended to solve, but rather theoretically eliminated the problem by postulating its nonexistence.

It may be appropriate in this connection to point out the difference between the League of Nations idea and the progressive concept as it appeared before the first World War. In the prewar period, progressive thinkers who were convinced that in the international sphere a legal regulation of political problems was impossible had hoped that politics would eventually disappear from that sphere and that the common, unpolitical interests would unite the peoples of the world in a peaceful, legally ordered community. The observance of the nationality principle appeared as one of the essential conditions of the realization of the ideal situation. But it was not expected that this situation would be reached before that principle was generally applied nor that it would be possible to put the principle into effect by peaceful means. Revolutions and wars commonly were regarded as the inevitable results of oppressive governments—that is, of governments disregarding the right of nations to be united in an independent state—and

revolutions and wars seemed the ordinary methods of compelling such governments to give up their unjust authority. During the World War the hope had arisen that the great struggle would result in a general reasonable and just situation as far as the nationality principle was concerned. The peace negotiations had demonstrated, however, the difficulty of finding a generally satisfactory solution in this respect, and it seemed even hardly possible to find a solution which would remain permanently satisfactory. The League, therefore, faced conditions which always had appeared as political and consequently as sources of war. But the working of this institution, which was created in order to exercise a control over these political conditions, presupposed the existence of the unpolitical legal community that progressive thinkers before the war had conceived of. Constant modifications of boundaries by agreement, arrived at under the guidance of a public opinion which was determined by principles of pure justice, were conceivable only when political considerations were of no importance at all. For such changes of frontiers were bound to affect the relative strength of the states concerned and could alter the whole power situation in the world, especially that situation which had resulted from the World War and on which the observance of the peace treaties seemed to depend. But the idea that the League had to prevent conflicts concerning territorial questions in itself implied that the ideal of an unpolitical world was not yet realized.

Territorial problems formed the subject of political disputes. These disputes frequently were defined as conflicts arising from the fact that one party demanded a change in the existing law. This law was regarded as expressed in the delimitation of the respective territorial spheres of the different states. In this connection it was observed that within national communities legislative procedure provided an opportunity for changing the law in accordance with changing conditions of life, but that international legislation was not developed enough to make possible such changes through an orderly procedure. Here again appeared the connection between political conflicts and international legislation; it seemed only necessary to improve international legislation in order to enable the League effectively to deal with politi-

cal problems. It must be noted, however, that international legislation, as conceived of by progressives before the first World War, was not regarded as having the task which now it seemed required to achieve. In the ideal situation as it was then expected to develop, international legislation was to lay down by consent rules required by reason for the regulation of the common unpolitical interests of the various peoples which had united in nation-states and had no longer any conceivable interest in territorial changes or in any other political problems. The idea that states corresponded to individuals in their role of private citizens and that they lived together under the rule of a law comparable to the private law of national communities was at the basis of that concept of international legislation, which, in the framework of progressive thinking, was the only one that could consistently be maintained. Within national communities, however, there existed besides the rules of private law those concerning the organization of the state and the acquisition and exercise of political power; the operation of these rules within the state organization makes it possible legally to control conflicting political activities out of which the policy of the state itself emerges. The adaptation of the legal order to changed circumstances through legislation forms part of this process. By instituting international organs, the Covenant had not transformed the international community in such a way as to make it similar to a state; the League could not fulfill in the international sphere the same tasks which the state performed in the national community.

The international community remained essentially in the same condition in which it had been when Oppenheim suggested an unpolitical organization of the world based on the principle of state sovereignty and equality. With these principles the existence of a political central authority standing above individual states had seemed incompatible. Such an authority was still nonexistent. The League could act only through individual actions of its member states. Its functioning depended on the good will of these states, or at least of their great majority. Under these circumstances the formulation of the common interest could be only a matter of calm reasoning, not of political activity. In the ab-

sence of a central authority as it existed within the states, such activity appeared as an element disrupting the community. The League organs were, therefore, essentially instruments for facilitating reasonable behavior, which consisted in the preservation of a supposedly natural harmony of interests. The Assembly and the Council were not supposed to formulate a definite League policy. The League Council especially was not, as might perhaps have been assumed, an organ determining the policy of the whole community in accordance with the political tendencies prevailing within that community. It was not quite clear in what sense the member states of the Council represented other members of the League. But it is evident that they were expected neither to represent currents of a political nature nor to promote any political program to be adopted by the League as a whole. The election by the Assembly of the nonpermanent members of the Council was not to be determined by considerations of this kind; nor were the Great Powers which occupied their Council seats permanently supposed to impose a certain policy on the League, although their privileged position was due to political considerations. So long as the League remained an association of independent states, it was impossible for legislation to fulfill in the international domain the same tasks with regard to political problems which it performed in national communities, and this situation could not have been altered by any attempts to improve the procedure of international legislation so long as this was an international procedure.

THE LEAGUE AS UNIVERSAL
QUASI GOVERNMENT

IT MAY NOW BE POSSIBLE to define more clearly the League concept of international government, or rather quasi government. It has been seen that the purpose of the League was to deal with political problems, but that it was supposed that the international community itself was not a political body. While before the first World War progressives hoped for the elimination of politics from the international sphere, the League was intended to control politics, whose continued importance was therefore assumed; but this task could not possibly be performed unless political considerations had lost their importance—that is, unless conditions existed which would have made the League unnecessary.

A particular process of reasoning, which clearly shows the influence of the progressive concept, led to the idea that an organization of this type would be a workable institution. The progressives, who before the war had believed that an unpolitical universal legal community was developing, had based this belief on the assumptions that the peoples of the world were united by reasonable unpolitical interests, and that because of the universality of these common interests the rules laid down in international agreements for the regulation of matters of common concern had a natural tendency to become universal. It has been seen above that the progressive concept had been somewhat modified as a result of the war. But it seemed possible, on the basis of the assumptions inherent in that concept, to arrive at some important conclusions concerning the problem of international government as it presented itself after the war and to find support for these conclusions in the previous practice of states. It appeared to be particularly significant in this respect that a number

of international agencies had been set up which permanently or for an extended period of time performed administrative functions of different kinds. The fact that these agencies existed and worked more or less satisfactorily seemed to justify the expectation that a global organization, assuming the fulfillment of the common tasks of the peoples in general, would also function successfully. International bureaux and commissions concerned with one specific subject of common interest, even agencies established under particular circumstances by a limited number of states especially interested in a certain matter, thus could be regarded as models of a general organization of mankind.¹ This process of generalization, which was characterized by the disregard of concrete conditions, especially conditions of a political nature, could be considered perfectly legitimate from the progressive viewpoint, of which this disregard was typical. From this viewpoint the question of procedure, of machinery intended to facilitate the satisfaction of common interests, was of primary importance. The existence of international organs handling matters of common concern, which could not be handled satisfactorily within the framework of a single state, seemed to reveal the natural procedure to be followed wherever there existed common reasonable interests. It thus became possible to expect that the types of international agencies which served the special interests of a group of states would prove workable also when they were used for the administration of the universal interests of mankind. International unions with a large membership, which like the Universal Postal Union had succeeded in a limited field in dealing with the problems concerned on their technical, unpolitical merits alone, appeared to indicate a progressive development which led to the solution of all international problems through organs guided in their work by reasonable standards rather than by considerations of power and politics. It appeared safe to assume that procedures used in particular cases would be equally useful if generally applied. Furthermore, it was believed that, in the process of extending international organization to all peoples and to all matters in which they had a common interest, the element of selfish national interest would gradually disappear which inevitably prevailed as

long as no universal organization existed. Since the existing administrative agencies had left intact the independence of the states which had established them, the fear that such a universal organization would destroy that independence appeared unjustified. It thus seemed reasonable to ask why there could not and should not be a global international organization dealing, in a spirit of abstract justice and reason, with all questions of general concern, including the most important of them, the prevention of war. Thus the idea emerged that there could be an essentially unpolitical community concerned with political problems.

Looked at from this viewpoint, diplomatic history revealed a considerable amount of useful precedents; methods adopted by states for solving international problems of various kinds assumed a new significance as models of a general regulation of international life. It seemed only required to purge those methods from the particular political elements which in the past had vitiated their working, and it was not considered necessary to ask to what extent their effectiveness had depended on particular political conditions. It was by a similar process of thinking that the World War had acquired the meaning of a precedent of a common action taken by the international community against a disturber of the peace. The successful prosecution of that war had required a close cooperation of the Allies even in nonmilitary matters. It seemed reasonable to assume that the unity of purpose which had been achieved in time of war would also be possible to obtain for the even more vital tasks of peaceful international intercourse.

A particular example of this type of reasoning can be found in the covering letter which, on June 24, 1919, M. Clemenceau, in his capacity of President of the Peace Conference, addressed to the Polish Representative, together with the Polish Minorities Treaty.² Through special legal instruments not embodied in the Covenant, the League was given certain duties with regard to the protection of racial, religious, and linguistic minorities in a number of Central and Eastern European countries against the danger of unjust treatment or oppression by their respective governments. The origin and purpose of this regime were explained in

that covering letter. It was pointed out there that the principle of an international protection of minorities was not new; diplomatic history afforded examples of treaties imposing on states the obligation to comply with certain standards of government with regard to minorities. But "under the older system the guarantee for the execution of similar provisions was vested in the Great Powers." Experience had shown that "this was in practice ineffective, and it was also open to the criticism that it might give to the Great Powers, either individually or in combination, a right to interfere in the internal constitution of the States affected which could be used for political purposes." Under the new system the guarantee of the rights of the minorities was entrusted to the League in a manner which was supposed to exclude the danger of political interference in the internal affairs of the countries concerned.

The League of Nations, which merely provided for a machinery designed to facilitate the cooperation of independent states, did not essentially modify the former structure of the international community. There existed no world government which could have interfered directly in the internal affairs of the states which had assumed special obligations concerning the treatment of minorities. The observance of these obligations ultimately depended on the states' good will to comply with them and to respect the supervising authority of the states united in the League. As stated in M. Clemenceau's letter, states had previously exercised such authority by virtue of international treaties. But it obviously was assumed that, when the states of the world united in a global organization and when some of them performed on behalf of that community tasks which formerly had been accomplished by isolated states or groups of states, the whole character of the action would change fundamentally. The states acting in the League were expected not to be motivated by particular political interests but to apply the principle of justice and reason, on whose universal validity the unity of the global community was based. The governmental activity of an individual state, bound to respect certain rights of minorities which were guaranteed by the League, seemed to be subject to a supervision not by other states but rather

by the community of mankind as such. It then appeared possible to hope that this supervision would be exercised in a manner that lifted the whole problem of minorities above the sphere of politics and assured the strict observance of just principles of government without regard to political circumstances and without the necessity of political compromises. The moral authority of mankind seemed sufficient to guarantee the effectiveness of the regime. It was easily forgotten that the system of the protection of minorities was imposed exclusively on weaker states under special political circumstances, and that its extension to all members of the League which comprised minorities among their populations was impracticable, although such an extension would have been logical in an organization uniting mankind under the rule of universal standards of conduct.

As the organized community of mankind, the League necessarily had a character different from that of the international community as it had been conceived of by positivist writers before the war. According to the positivist concept, the international community was a limited group of states, the civilized states of the world, which lived together under a legal order which they had laid down for the regulation of their mutual relationships. The League, however, was not intended to serve the specific interests of a certain group of states which for this purpose agreed to observe a particular set of legal rules. It was rather designed to organize the global community, which supposedly was kept together by natural ties, in such a way as to facilitate the observance of the universal principles of reason and justice. The organization was, therefore, in principle to be universal. It is true that the League was not supposed to cover the whole world from the start, and the Covenant expressly took account of its lack of universality by laying down rules concerning the relationship between the League and nonmember states.³ Provision was also made for the withdrawal of member states from the organization.⁴ But it was assumed that their natural interests would make it practically impossible for the members to exclude themselves from the organization. The fact that, at the time of the League's establishment, it could not be foreseen when some important states, espe-

cially Germany and Russia, would be fit for membership, resulted from particular circumstances. The general barrier, which formerly had separated the civilized from other states, tended to disappear. States like China, which before the war had not been regarded as full members of the international community, were among the original members of the League.

It has been seen before that the unity of the community of mankind, which resulted from the universal standards of reason and justice, appeared to be higher in kind than the unity produced within the various sections of humanity which were organized as states. Standards of reason and justice, rather than of mere legality, were supposed to guide public opinion, which was the highest authority in the global community and, therefore, in the League of Nations. President Wilson very clearly expressed this idea when he declared in Paris that "public opinion gives judgment in a manner that is broader and more equitable" than the decision of a law court.⁵ On the same occasion Wilson said: "Matters which relate to the good faith of nations are extremely delicate; in such a case the only sanction is that of public opinion. The Courts of Justice make their decisions according to the rules of law, and in such a matter as this the moral judgment of peoples is more accurate than proceedings before a tribunal."⁶ The maintenance of justice was one of the objects of the League which, in the Preamble, the Covenant mentioned before the respect for all treaty obligations—that is, for the rules of positive law.⁷

According to the progressive concept of the community of mankind, the universal standards of justice and reason applied not only to the relationships between states, but also to the states' internal affairs. That community, with which the League was supposed eventually to coincide, was conceived of as uniting the individual members of the human race in spite of the fact that they belonged to different states. The unity seemed established through the highest principles of human conduct common to all human beings. Thus the League could appear as "an organization of liberty and mercy for the world."⁸ It therefore was concerned with the condition of the individuals within their various national communities, with their mutual relationships, and their relations

to their governments. It was one of the fundamental principles of the progressive concept that the peace of the world depended on the observance, within the various states, of the standards of reason, liberty, and justice. This observance alone seemed to make it possible to maintain, in a world divided into states, the connection between the members of the human race. Accordingly, the states composing the League of Nations were to have a democratic form of government.⁹ In addition to this general rule, there were provisions of a particular nature which were based on the idea that there existed a close relationship between order and peace in the global community and the condition of the individuals within their respective states, and that that community had the task of guaranteeing the respect for certain standards of freedom and humanity. Reference has already been made to the rules concerning the protection of minorities. Another example may be found in Part XIII of the Treaty of Versailles, which provided for the establishment of the International Labour Organisation. It was pointed out there ¹⁰ that the Contracting Parties agreeing on these provisions were "moved by sentiments of justice and humanity, as well as by the desire to secure the permanent peace of the world"; the conditions of labor seemed to involve "such injustice, hardship and privation to large numbers of peoples as to produce unrest so great that the peace and harmony of the world [are] imperiled." Finally, Article 22 of the Covenant, which dealt with the mandate system, may be mentioned in this connection. The peoples that inhabited certain territories formerly belonging to the conquered states were not regarded as capable of independently governing themselves. But these peoples were not considered to be outside the bond uniting all mankind. Article 22 declared that their well-being and development formed "a sacred trust of civilization," and the mandates system was represented as a method of performing, through the League, the duties thus imposed on humanity. The tutelage of the peoples concerned was entrusted to advanced nations which were to exercise their tutelage as mandatories of the League and under the latter's supervision.

Since mankind was bound together by the universal and high-

est standards of human conduct, the fact that the global community dealt with a certain matter seemed automatically to raise it into a sphere where reason and justice prevailed. Problems which in the internal life of a nation were the subject of passionate conflict could then be supposed to appear in a different light in that higher sphere. Thus President Wilson expressed the view that the purpose of the International Labour Organisation was to lift the labor question of the day "into the light," "out of the haze and distraction of passion, of hostility."¹¹ He told his audience: "The more men you get into a great discussion the more you exclude passion. Just as soon as the calm judgment of the world is directed upon the question of justice to labor, labor is going to have a forum such as it never was supplied with before, and men everywhere are going to see that the problem of labor is nothing more nor less than the problem of the elevation of humanity."¹²

The League, although interested in the condition of the masses of individuals and supposed to unite these masses in a universal organization, was however composed of communities which were organized bodies themselves and which had gathered in the League in order better to be able to maintain their independent existence. Here again the inconsistencies became apparent which were inherent in the progressive concept in general and in the League of Nations idea in particular. The principle of state independence appeared to be in conflict with the other principle, which seemed to require the performance by the global community of governmental or quasi-governmental tasks.

The League Covenant contained a clause expressly protecting the independence of its member states. This clause was paragraph 8 of Article 15, which was inserted in the Covenant on American initiative. It provided that if a dispute likely to lead to a rupture was submitted to the Council, this organ was not allowed to make a recommendation as to the settlement of the conflict if the dispute were found to arise out of a matter which, by international law, was solely within the domestic jurisdiction of one of the parties.¹³ It was supposed that, under international law, each state enjoyed complete freedom of action with regard to

certain matters; the international community was not permitted to intervene in this sphere of discretion even through a recommendation that was not binding on the states concerned. This provision seemed to be in accordance with one of the fundamental principles of the new order established after the war. This principle, as expressed by President Wilson, was that "the countries of the world belong to the people who live in them . . . they have a right to determine their own destiny and their own form of government and their own policy."¹⁴ It obviously was assumed here that the various peoples would use their freedom in a manner compatible with the common reasonable interests of mankind; it was hoped especially that they would freely adopt and maintain a democratic form of government. Otherwise it would be difficult to understand why it seemed unnecessary generally to secure the maintenance of democratic institutions within the different national communities, which was regarded as the principal guarantee of peace and, consequently, as a condition of acquiring membership in the global organization. The progressive concept, in the light of which the human race appeared continuously to rise to higher stages of development, evidently made the trend leading to the adoption of that form of government seem irresistible and to exclude the idea that positions once obtained would be abandoned again. Thus Wilson felt justified in saying that there were "not going to be many other kinds of nations long" than those whose governments were their servants and not their masters.¹⁵ The realization of the ideal situation, as conceived of by the adherents of traditional progressive internationalism, thus seemed near. While the individual members of the human race appeared permanently to be unable to coexist without being united in states, it was considered possible to expect that the states themselves would develop in such a way that they would become ideal persons motivated in their conduct by the reasonable interests of their respective peoples, which coincided with those of mankind.

The internationalists believed that before the ideal situation was reached, revolutions might be necessary in order to make peoples free from oppressive governments. In several of his speeches

Wilson made it clear that the League had not the task of suppressing revolution undertaken for this purpose and that especially Article 10 of the Covenant did not "stop the right of revolution."¹⁶ Rebellion here evidently was supposed generally to have the purpose and effect of liberating people from oppression, especially from subjection to foreign rulership. It seemed to be possible to expect that a people whose aspirations for national independence were satisfied would govern itself in accordance with the principles of liberty and justice which guaranteed universal peace and harmony.¹⁷

But revolution was not to be necessary under the new regime in order to give a people which wanted to live independently the liberty to which it was entitled. As President Wilson constantly pointed out, the Covenant, especially its Article 11, offered to the oppressed peoples of the world a regular procedure of obtaining justice and even complete independence. In paragraph 2, that article declared it to be the friendly right of each member of the League to bring to the attention of the Assembly or of the Council any circumstances whatever affecting international relations which threatened international peace or the good understanding between nations upon which peace depended. There existed now a forum "for the right of mankind," and, on the initiative of any League member, nations which wished to exercise the power of self-determination could "come into that great forum, they [could] point out how their demands [affected] the peace and quiet of the world."¹⁸ Thus, "weak and oppressed and restive peoples" could be given "a hearing before the judgment of mankind."¹⁹ In this connection it may be recalled that Article 19 of the Covenant was intended to make possible a peaceful change of frontiers in accordance with the wishes of the populations concerned. By these provisions the League was given the authority to deal with questions which essentially concerned the internal affairs of its member states, through a procedure which was supposed to be effective.

It seemed logical thus to provide for an intervention by the global community for the purpose of safeguarding the liberty of the peoples of the world. But the idea that that community

could intervene in the internal affairs of a state obviously was in conflict with the general principle according to which the management of those affairs was left to each state. This conflict was inherent in all theories of international law that were based on the concept of state independence but at the same time wanted to demonstrate the possibility of enforcing the international legal order. It was also apparent in the League of Nations idea.

The optimistic assumptions concerning the use which the states would make of their freedom were contradicted by the idea that the League of Nations, representing the universal community, was entitled and obliged to intervene in order to give peoples the liberty to which they justly aspired. That idea implied the necessity of continuously subjecting the states to the control of a higher authority. By providing for a regular procedure intended to lead to the liberation of oppressed peoples, the Covenant admitted the continued existence of oppression within states and the permanent risk of an abuse of the power which states had at their disposal.²⁰ The distrust of power and of those who hold it had always been one of the characteristic elements of the progressive concept, which could not easily be reconciled with the belief in the state as an ideally reasonable person. It was that distrust which seemed to exclude the superstate as a possible solution of the problem of world organization, because the existence of a government covering the whole world would simply have enlarged the risk of the abuse of power. If the various states and their governments needed control and if this control were not to be exercised by a superstate, then the masses of the individual members of the human race necessarily appeared as the highest authority in the world. Not the states, but all the normal individuals of the world together thus became, as far as the global community was concerned, the ideal persons who were able uniformly to ascertain and to express, in the form of public opinion, the universal standards of justice and reason, although the same individuals admittedly needed a state organization for their peaceful coexistence in national communities. The idea that the global community ultimately derived its authority not from states but from the masses of individuals frequently found expression in

the statement that the League of Nations was not an association of governments but of nations or peoples.²¹ The peoples of the world, who supposedly shared the same natural interests, here were opposed to the governments which represented the state and its sovereignty. From this point of view the principle of the sovereignty of states was not an expression of the reasonable rule, according to which each state was free to conduct its own affairs. It rather indicated a state's and its government's insistence on a policy of selfishness and disregard for the general interest. In this connection it must be made clear that the provision of paragraph 8, Article 15, which restricted the intervention of the League with regard to matters within a state's domestic jurisdiction, was not inserted in the Covenant because such matters (as, for instance, tariff and immigration questions) could not possibly concern other states. On the contrary, this clause expressed the reluctance of states to admit interference in affairs which they wanted to regulate according to their own will, although other states were vitally interested in their regulation. Thus, by their insistence on sovereignty, the states, as represented by their governments, appeared to keep the peoples of the world separated and to obstruct rather than promote the satisfaction of the common reasonable interests of mankind. The difficulties that were bound to arise under these circumstances could be solved only, it seemed, if the states could be induced to surrender part of their sovereignty to the universal community. This possibility could be envisaged only if it were understood that sovereignty was not a quality which a state had to possess in its entirety if it were to remain a state. Then it was a question of the development of international law to what extent subjects which had been solely within the states' domestic jurisdiction became matters of international concern. From this point of view the development of international law seemed to lead not only to a clearer definition of the mutual rights and duties of states, but also to an increase in the global community's authority to deal with questions which formerly had been within each state's sphere of discretion.²² There appeared to exist no reason why, by this method, the global community should not acquire rights of supervision with regard to the exercise of governmental

authority within the national communities, just as the League controlled its members' right to go to war. It seemed appropriate to submit to the judgment of mankind "all the questions which have eaten into the confidence of men towards their governments."²³ The mandates system provided for the supervision of the manner in which certain backward peoples were governed; it could be regarded as a model for the administration of colonies and other dependencies under the control of the League.²⁴ Certain minorities enjoyed an international protection of their rights by virtue of special undertakings. The idea could arise that not only this protection should be extended to all minorities, but also that a general international guarantee of the rights of man should be established which would secure for each subject of a state the respect of his essential liberties.²⁵

When it was hoped that the states would give up parts of their sovereignty to the international community, it was not expected that eventually that community would become sovereign in the same sense in which the states were sovereign. The global community was supposed to derive its superior character from the fact that, instead of being governed like a state, it was to be guided by the public opinion of mankind, which was regarded as expressing the standards of justice and reason without being disturbed by political considerations. That community's authority was considered to be superior to that of the various political units into which the world was divided. Therefore it should have been independent of these units. It then might have appeared that the matters of common concern to mankind as a whole were administered best by bodies composed of independent, impartial, and reasonable persons who acted under the direct guidance not of states but of the masses of the members of the human race. The League of Nations, which was intended to be the organization of the community of mankind, however, was an association of organized peoples; its members were states,²⁶ and its main organs, the Council and the Assembly, were composed of delegates of states acting in accordance with the instructions which they received from their governments.

At the time when the League came into existence the incon-

gruity of this situation was not overlooked entirely. For instance, the idea that the League Council, the members of which were states and not individuals, should act as an independent organ of the global community was expressed not only by irresponsible dreamers and prophets. In 1920 in one of the first sessions of the Council, the Italian delegate Tittoni declared that "the Council was not a Conference of Governments, but that the Delegates, once appointed, were free to act as members of an international body as independent as the magistrates of a court."²⁷ In his opinion "the whole future of the League depended on convincing the world that the Delegates on the Council were not mere puppets of which the Governments held the strings." This statement was at once opposed by the British representative, and the latter's opinion was confirmed by the First Assembly, which declared that the representatives on the Council were "responsible to their own Governments and to those Governments alone."²⁸ In later years it was regarded as desirable that the Council members be represented on that organ by the Prime Ministers or Ministers of Foreign Affairs—that is, by persons who were able most authoritatively to express the views of their respective governments. Supporters of the League regarded the fact that states conformed to this principle as a proof of the organization's importance and vitality. This kind of representation, in fact, corresponded to the idea mentioned above, that the Council was intended by its composition to reflect the actual distribution of the organized political power of the world. But in 1920, during the Council session referred to before, the principles which should guide a state in the selection of delegates to that body had been discussed from a different viewpoint.²⁹ According to the summary in the Minutes of the opinions of the Council on the subject, "emphasis was laid upon the advisability of securing that representatives on the Council should, as far as possible, be the same persons from session to session; the continuity of policy and authority of the Council would thereby be assured." One of the representatives particularly stressed the need for continuity in representation in view of the instability of governments. Here it obviously was understood that the Council should exercise an authority independent

of that of the states which were its members. This view evidently conflicted with the idea that the Council was to be composed of the leading statesmen of their respective countries.

The Council was supposed to direct the affairs of the League under the general guidance of the Assembly, in which all members of the organization were represented by delegates. President Wilson expected the Assembly to perform the task of "the court of the public opinion of the world."³⁰ But the delegates at the Assembly were selected by their respective governments and voted according to the instructions which they received from them. At the time when the Covenant was drafted it was realized that there was a certain inconsistency in the idea that the public opinion of mankind should be expressed through the official delegates of states whose conduct was supposed to be controlled by that public opinion. The problem arose how "to bring the League into more direct relations with the peoples of the States members of the League."³¹ Such a direct relation was indeed of primary importance if the League was to constitute the organization of mankind and to control, on behalf of the peoples of the world, the governments of states and especially to check the abuse of power which these governments might commit. The following proposal was submitted to the League of Nations Commission of the Peace Conference: "At least once in four years, an extraordinary meeting of the Body of Delegates shall be held which shall include representatives of national parliaments, and other bodies representative of public opinion, in accordance with a scheme to be drawn up by the Executive Council."³² This proposal was not adopted. In its final form the Covenant provided that each member of the League could have three representatives although only one vote at meetings of the Assembly,³³ and it was understood that each state was free in the selection of its delegates. In the following passage of his speech before the Plenary Session of the Peace Conference on February 14, 1919, President Wilson stated the problem of making this Assembly representative of the peoples and explained the reasons for the solution adopted by the Commission:³⁴

When it came to the question of determining the character of the representation in the Body of Delegates, we were all aware of a feeling which is current throughout the world. Inasmuch as I am stating it in the presence of official Representatives of the various Governments here present, including myself, I may say that there is a universal feeling that the world cannot rest satisfied with merely official guidance. There reached us through many channels the feeling that if the deliberative body of the League was merely to be a body of officials representing the various Governments, the peoples of the world would not be sure that some of the mistakes which preoccupied officials had admittedly made might not be repeated. It was impossible to conceive a method or an assembly so large and various as to be really representative of the great body of the peoples of the world, because, as I roughly reckon it, we represent as we sit around this table more than twelve hundred million people. You cannot have a representative assembly of twelve hundred million people; but if you leave it to each Government to have, if it pleases, one or two or three representatives, though only a single vote, it may vary its representation from time to time; not only that, but it may originate the choice of its several representatives, if it should have several, in different ways. Therefore, we thought that this was a proper and a very prudent concession to the practically universal opinion of plain men everywhere, in that they wanted the door left open to a variety of representation instead of being confined to a single official body with which they might or might not find themselves in sympathy.³⁵

This method of representation could hardly be regarded as a very satisfactory solution of the problem of establishing direct contact between the League and the peoples. The governments determined the composition of their delegations. Even if a government selected a person who was not in general agreement with its policy, such as a member of an opposition party, the vote of the state was to be cast according to the instructions which the government gave to the delegation.³⁶ Under these circumstances it depended not on the persons of the delegation but on the general relationship within each state, between government and people, to what extent a people could be considered represented by the state's delegates on the Assembly.³⁷ When the member states of the League were "fully self-governing" in the sense in which this term originally was understood, then the peoples could be

*regarded as expressing their opinions through the representatives of their respective states. In this sense Wilson said in the League of Nations Commission of the Peace Conference: "Every government which will be a member of the League is a responsible government and if it does not satisfy public opinion, it will be subject to criticism and so compelled to choose representatives who will satisfy public opinion."*³⁸

This statement indicates the solution of the representation problem which must be considered to be correct from the viewpoint of the optimistic progressive who believed that the states in general had become more democratic, that consequently the governments expressed the will of their respective peoples, and that thereby the reasonable conduct of state affairs was guaranteed. But the problem of giving the peoples representation in the League Assembly had arisen just because it seemed that governments could not be trusted and that an authority was required which was higher than the states directed by them. It is the fundamental conflict inherent in the League of Nations idea which here again becomes apparent. The conditions which the League was intended to realize had to exist already if the organization were to fulfill its tasks. Although the League was supposed to function under the supreme authority of the peoples of the world and thus to establish an authority independent of and superior to any state organization, it nevertheless was not meant to be an experiment in ideal anarchism. The sovereignty of the states was to be restricted, but they were not expected to disappear and to leave the masses of individuals entirely under the direct control of the community of mankind which in itself was not a political body. The members of the League were states, not individuals or groups of individuals, and ultimately it could act only through its member states. Under these circumstances, the success of the League depended on the reasonableness and good will of the states acting through their governments. According to the progressive concept, only states which were governed democratically could be expected to possess these qualities. A democratic government was supposed to express the will of its people and to act in accordance with the natural interests which their people shared with all

the other peoples of the world. States and governments of this type alone could coexist peacefully under the rule of a universal law. The question as to the superior character of the states or the masses of individuals composing them did not arise when the states were simply organizations through which those masses acted. According to the progressive idea, if the peoples of the world were governed democratically, the community of states would have coincided with the community of mankind. Organs established and controlled by governments for dealing with matters of common concern to all peoples automatically could have been expected to serve the interests of those peoples. In this case the states evidently would not have required any supervision of their management of internal affairs. On the other hand, when a general supervision of governmental activities by the community of mankind was necessary—that is, when that community should have had an existence independent of the aggregate of states—the conditions were absent which made it possible to assume that, in an association of states, there was an authority different from and superior to the states. The formation of a world public opinion which was to exercise that authority appeared in the progressive concept as the result of the general adoption of a form of government which guaranteed the freedom of the citizens, especially the liberty of expressing their thoughts. The more general the need of an international guarantee of individual liberty became, the less likely was the formation of a uniform opinion of this world upon which that guarantee was to be based. Once the states were not regarded as ideal persons, the whole idea of relationships in the global sphere was modified. The world appeared as divided into states which, considered from the progressive point of view, had not reached the final state of perfection, but whose governments nevertheless generally found some kind of popular support. The progressive thinker might have regarded as improper the means by which this support was secured; a government's power might have seemed to be based on force and misinformation of the people rather than on free consent resulting from reasonable considerations. But the fact remained that there existed various public opinions supporting divergent governmental practices in differ-

ent states. They upheld their respective governments with regard to the determination of the national interest. The analysis of the League's system of collective security has shown that this system seemed required because the various states had vital interests of their own which constituted a source of political conflicts. As long as the world remained divided in this manner, the division necessarily was reflected in a global organization which did not have the character of a superstate. The relationships which gave the global community its particular character were relationships between states which were always at least potentially political.

This character of the international sphere remained the same when *there existed an organization which united a great number of states or all of them. Giving such an association of states the right to deal with matters considered to be of common concern to all states did not necessarily have the effect of lifting these matters out of the sphere of politics into an unpolitical sphere of justice and reason.*³⁹ Whenever states allowed an organization of this type to intervene in their internal affairs, they did not surrender parts of their sovereignty to a higher entity. Such an undertaking simply meant that the matter in question became a subject of rights and duties of several states. It then naturally depended on the circumstances of the concrete case whether or not states entrusted certain questions to an international organ; these circumstances also determined the degree of authority which could be conferred on such an organ, this body's composition, the number of states which could be associated with the international regulation of such questions, and the possibility of dealing with the matter in question in an unpolitical manner. In any case the so-called surrender of sovereignty did not alter the fact that the effectiveness of international control depended on the good will of the states concerned—or, if this good will were absent, on the willingness of the other states to use pressure against them—and it was to be expected that all decisions to be made in this connection would be conditioned by considerations of national interest and power.

THE LEAGUE AS A CENTER OF
NONPOLITICAL ACTIVITIES

THERE EXISTED a number of important international problems which seemed to lend themselves to a purely unpolitical treatment by the global community. These were the "technical" problems with which the League of Nations dealt through specialized technical organizations and advisory bodies. The progressive idea was still alive that the unpolitical interests common to all human beings would keep the peoples of the world together in a peaceful universal community if they were left free to satisfy these interests in a reasonable manner. In the economic domain, which appeared to comprise the most important of the nonpolitical interests, progressive internationalists still regarded free trade as the most reasonable principle, the general application of which would result in general welfare. In the third of his Fourteen Points, Wilson proposed as part of "the program of the world peace," "the only possible program, as we see it," the "removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance." The general application of the rule of equality of trade conditions necessarily seemed to progressives to be particularly desirable even if the principle of free trade were not fully realized and states remained free to adopt measures designed to restrict the import and export of goods. For a system of equality, such as would have resulted from a generalization of the most-favored-nation treatment, made the world appear as a unit, because the position of each state was the same with regard to all other states, so that each state seemed to have economic relations with the whole world instead of dealing separately and differently with every other state. The clause

of the Covenant dealing with economic matters¹ did not embody Wilson's program. It only provided that "subject to and in accordance with the provisions of international Conventions existing or hereafter to be agreed upon, the Members of the League . . . will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League." But whatever the correct interpretation of the term "equitable treatment" may have been, the guiding idea of the League agencies dealing with economic matters evidently was to establish a general regime of free or at least freer international commerce, which theoretically was regarded as a guarantee of universal welfare and prosperity.²

Besides questions of communication and economic problems, Article 23 of the Covenant mentioned a certain number of other matters in regard to which the members of the League undertook to cooperate. This provision implemented the clause of the Preamble, which declared the promotion of international cooperation to be one of the purposes of the League. In its Part XIII,³ which laid down the rules concerning the "Organisation of Labour," the Treaty of Versailles declared that "the League of Nations has for its object the establishment of universal peace, and such a peace can be established only if it is based upon social justice." In the progressive's opinion just social conditions resulted from the satisfaction of the natural interests of the peoples of the world which were regarded as essentially unpolitical.⁴ It was expected that international cooperation designed to satisfy those interests would have a beneficial effect on the political sphere insofar as it reduced the danger of war. On the other hand, it was recognized that without peace international cooperation could hardly be successful. It thus was realized that there existed a certain relationship between the political and the unpolitical domains and that the two spheres influenced each other; but they were regarded as separate spheres which were supposed to be essentially different.

The League of Nations, primarily designed to preserve peace by facilitating the settlement of political disputes and by restricting the right to go to war, seemed also to provide an appropriate

framework for the management of the common affairs of mankind which were of an unpolitical nature. Article 24 of the Covenant dealt with international bureaus established by general treaties and commissions for the regulation of matters of international interest; in principle these organs were to be placed under the direction of the League. This provision, which was intended to make the new organization a center of international cooperation, did not find extensive application. But the League itself set up a machinery, the purpose of which was the centralization of work concerning the promotion of economic and social welfare throughout the world. The idea underlying the establishment of this machinery was that a permanent organization was required to deal on a global scale with all problems of this kind. Whereas previously international cooperation had developed in different separated fields and had led to the creation of a variety of agencies unrelated to each other, now the necessity was felt to establish a central organization which covered a wide range of technical activities. This feeling corresponded to the idea that mankind was a unit kept together by the reasonable, unpolitical interests which were common to all peoples irrespective of the political division of the world; it was assumed that more and more interests would transcend the national sphere and would acquire an international character. It has been noted above that it was not easy to reconcile the progressive idea, according to which the international sphere was steadily expanding at the expense of the national domain, with the belief, also inherent in progressive thought, that, in order to deal with the increasing number of international interests, no statelike organization of the world was required, but that it was sufficient to provide for the maintenance of harmonious relations between the various peoples which belonged to different independent states. The League of Nations, although not a superstate, created a general link between various bodies designed to promote international collaboration in different fields, and to that extent was supposed to make the global community similar to a state in which specialized agencies performed different tasks within a centralized organization and in accordance with general principles of government. The existence of a permanent machin-

ery seemed to guarantee the orderly progress of collaboration between the peoples of the world.

The type of work to be accomplished by the different agencies varied according to the fields in which they were operating. But generally these bodies had the task of preparing for the conclusion of conventions regulating the rights and duties of states in a certain domain. It was hoped that as a result of this work a network of international agreements gradually would cover the whole range of matters of international concern. It was expected that this process of lawmaking would contribute to the development of a system of global law embodying rules of general validity.

The final drawing up of the texts of agreements to be signed and ratified or to be adhered to by the various states generally was the task not of the Assembly but of special conferences held "under the auspices" of the League of Nations. Preparation of the agreements was one of the major duties of the advisory committees set up by the League and constituted an essential part of the League's machinery in the field of technical activities.

The Assembly and the Council were supposed to exercise a general supervision over the work of the various bodies dealing with technical matters and especially to determine the scope and direction of this work.⁵ But the technical organizations and advisory bodies set up by the League were to enjoy a certain independence which allowed them to treat the matters under consideration as technical problems.⁶ It was considered to be the characteristic feature of these matters that they lent themselves to technical treatment and, therefore, to purely legal, unpolitical regulation. In one of its publications designed to inform the public of the League and its activities,⁷ the League Secretariat explained that, within the Communications and Transit Organisation, the problems concerning communications and transit were to "be dealt with on their technical and legal merits, excluding so far as possible anything that might lead to political rivalries." The guiding principle of the Organisation was to provide for international contacts other than those established "through political and diplomatic agents."⁸ In its technical bodies, especially the advisory committees and the subsidiary committees set up by

them, the League tried to maintain direct contacts between persons who, through the work which they performed as public officials within their respective countries or through their private occupation, had acquired special knowledge of technical problems interesting the community of mankind. In this manner it seemed possible to pierce the walls which national sovereignty erected between the states and to bring together in international organs the peoples of the world rather than the states.⁹

Expert knowledge of the matters concerned appeared as an essential qualification of the persons entrusted by the League with work in its technical bodies. Technical problems were supposed to find a rational solution when they were considered from a merely technical viewpoint. The autonomy of the economic sphere especially seemed to the progressive thinker to make it possible and necessary to solve economic problems on the basis of purely economic considerations. If, as progressives assumed, the sphere of technical cooperation corresponded to the various reasonable, unpolitical interests which harmoniously united the peoples of the world, then the technical and the international viewpoints coincided, while the national viewpoint appeared as political and, therefore, as opposed to a purely technical and rational consideration of world problems.¹⁰ It was, therefore, the expert who appeared to be best qualified to discover the rules whose observance guaranteed the maintenance of the harmony which existed in the world unless it was disturbed by irrational human conduct. Bodies composed of experts, particularly of experts who were not bound by governmental instructions, were expected to be able to deal with international technical problems in a scientific, unpolitical manner, while statesmen and politicians seemed necessarily to consider all international matters from the standpoint of the narrowly interpreted national interest rather than from that of the general welfare. The standpoint of the individual state defending its particular interests appeared to constitute the most important disturbing factor in the field of international collaboration. Guided by the principle of national interest, the states adopted measures which obstructed the free intercourse between the peoples of the world which was supposed to be an essential

condition of universal harmony. It was hoped that expert bodies, supposedly free from the influence of narrow national policies, would demonstrate the advantage, for each individual country, of considering the well-being of the whole world,¹¹ and that their authority, which was the authority of science and reason, would induce the states to agree on rules of conduct best adapted to the nature of the particular subject. The expert thus appeared as the representative of the international community—a community conceived of as being independent of and superior to the aggregate of states pursuing national policies.¹²

Actually, however, the members of expert bodies studying international problems with the view of finding reasonable and generally beneficial solutions were not entirely independent of their respective governments. Expert committees were composed of nationals of various states, and it generally was attempted to have as great a number of nationalities represented on them as was thought compatible with the efficiency of their work. Even when appointed in an individual capacity by an international organ, especially by the Council of the League, the experts were not selected for League service without their government's consent. Moreover, their selection often was determined by the fact that in their respective countries the experts occupied positions which placed them in close contact with their governments. Thus, as members of the League's Economic Committee, persons were selected who were considered the "reliable exponents of the commercial policy" of their countries.¹³ But after an experience of about fifteen years it appeared that within the League machinery not enough attention had been paid to the close connection between the work to be performed by experts and the policy of the various governments. In 1935 a special committee appointed by the Council to study the constitution, procedure, and practice of the League's technical committees made in its report the following statement, which clearly implied a criticism of the League's practice as previously followed: "The League is essentially a governmental organisation. Its constituent Members are countries as represented by their Governments. Its progress depends upon the effective desire of the Governments to use its machinery, and

upon the possibilities of securing an adjustment of national policies within the spheres in which co-ordinated and co-operative international action is required; and practical action, to give effect to the work arranged through the League, is in most cases only possible through the executive machinery of the national Governments." ¹⁴

With regard to the role of experts, the Committee stated: "It is an essential part of the League's task, in accomplishing this co-operative function, to make available the assistance and advice of experts who are able to study the various problems from an international and scientific point of view." But after having defined the tasks of experts in terms which seemed to confirm the progressive belief that the international and the scientific viewpoints coincided, the Committee went on to say: "Such expert studies must, if they are to be useful, include an adequate knowledge of the problems themselves and of those features of national policy which form an integral part of these problems. This means that such experts must often partake, in very varying measures according to the nature of their work, of the character of national representatives."

It was recognized here that among the various technical activities of the League there existed differences with regard to their scientific, technical, unpolitical character. and that consequently the relationship between the members of the various expert bodies and their governments was to be determined differently. Thus the committee declared: "Where the problem is essentially scientific (as in the case of medical investigations or some forms of economic intelligence), the experts will not be 'national', though of different nationalities. . . . Where the work (as in the case of the Economic Committee) consists essentially in co-ordinating and adjusting national commercial policies, the experts will need to be intimately associated with those policies and to be capable of influencing them." ¹⁵

After having stated the principles of technical cooperation, the Committee made some recommendations of general application—that is, recommendations concerning all types of technical committees. The first recommendation ran as follows: "It is essential

that both the effective initiative and the control in regard to the undertaking and carrying out of different tasks should be in the hands of the Governments. The Council and the Assembly will constitutionally be in supreme control, but it is expedient that, within the general framework of action approved by them, specialised bodies of Government representatives should control different spheres of work. It is within the lines so determined that 'expert' or 'technical' bodies must work."¹⁶ The League's technical activities were, therefore, not only to be carried out under the general supervision of Council and Assembly, by committees composed of persons who themselves were in more or less close contact with their respective national authorities, but each of these activities was also to be controlled by an organ composed of persons who were appointed by and responsible to their governments.

The expert here appeared in a role entirely different from that originally assigned to him. He no longer was the independent representative of the global community based on the universal validity of the standards of reason and science. He now was to occupy the subordinate position of adviser to a body of persons each of whom represented his state and its particular interests. Contacts between those who could most authoritatively speak for their states now appeared to be more important than the combined efforts of those who were able to find the best scientific solution of a given problem. According to the Committee, there was no reason "why the League should not seek, when the matter [was] of sufficient importance, to solve economic and financial problems through the effective collaboration of Ministers of Finance and Economics, in the same way as Foreign Ministers [collaborated] in the Council to solve political problems." The general conditions of successful international cooperation in the technical fields were described by the Committee in the following words: "If a given problem is ripe for international action; if the internal policies are sufficiently elastic and capable of modification to make such action possible; and if the Governments definitely desire it, real progress will be made. . . . Where, how-

ever, these conditions do not exist, no possible machinery can do much useful work."

In other words, the success of international collaboration depended on the concrete conditions of each individual case and on their appreciation by the various governments concerned. The idea that the mere existence of an international machinery would result in a steady progress of law and order in all technical fields seemed abandoned. Not the scientifically ascertained requirements of the general welfare of mankind but the interests and policies of the individual states were recognized as the essential factors determining international collaboration. This recognition seemed to imply the admission of the fact that the so-called technical matters did not necessarily have an unpolitical character. As matters of divergent national policies, they could become important elements in the international political domain—that is, in the sphere where the relationship between independent states were determined by these states' interests and their relative power.

The inadequacy of the terms "technical" or "unpolitical" problems, customarily used to describe certain matters with which the League was dealing, was emphasized in the report of the "Bruce Committee." In 1939 that body, whose chairman was Mr. Bruce—then High Commissioner for Australia in London—studied "the appropriate measures of organisation which would ensure the development and expansion of the League's machinery for dealing with technical problems, and promote the active participation of all nations in the efforts made to solve those problems."¹⁷ In the first part of its report the Committee made the following statement with regard to the terms to be used to designate the problems under consideration: "At the outset of our work, we were struck by the inadequacy of the phrase 'technical problems,' by which it has become customary to describe the questions with which the greater part of the League's total activities are concerned. The distinction generally made in connection with the work of the League between 'political' and 'technical' problems is equally unfortunate. The term 'political problems' normally refers to problems of political relations between States or,

in other words, what are in each country known as 'foreign affairs'; but so-called 'technical problems' are in every country political questions, frequently the cause of internal controversy and often necessitating international negotiation."¹⁸ Accordingly, the Committee decided to describe as "economic and social questions" the various subjects which previously had been grouped under the heading "technical" problems.

The Committee obviously believed thus to have solved a question of mere terminology, but the problem which it had raised evidently was of far greater importance. The fundamental progressive idea that there existed autonomous spheres outside the domain of politics, spheres in which there was a natural harmony of reasonable interests, seemed to have become doubtful. The fact that the Bruce Committee raised this question and answered it in the sense indicated above is all the more surprising as in its report the Committee suggested a more rigid separation of the political work of the League from its activities in the economic and social field than had existed before. The Committee's principal task was to study the means of "rendering more effective the collaboration of non-member States in the technical activities of the League."¹⁹ The idea underlying the establishment of the Committee, as well as its proposals, was that the League, which had failed in the political domain, could be preserved as an instrument of world-wide cooperation in other fields, and that states which did not wish politically to collaborate with the League could be induced to take part in its other activities if these were made as independent as possible. The Committee proposed that the League Assembly should set up a new organism, the Central Committee for Economic and Social Questions, a sort of Economic and Social Council,²⁰ to which the direction and supervision of the work of the League committees dealing with economic and social questions was to be entrusted.²¹ Whatever terms were used to describe the matters concerned, this scheme of coordinating certain of the League's activities actually was based on the assumption that these activities concerned problems which generally were different from political questions and could always be dealt with separately. This assumption, however, seems not to be in accordance with

the observations of the Committee regarding the impossibility of generally defining economic and social questions as unpolitical or technical.

The Bruce Committee's unawareness of this inconsistency may be explained by the fact that international cooperation in the economic and social fields of the type which the Committee had in mind could hardly lead to political controversies. The report observed that in the course of the League's existence the purposes and methods of international collaboration had changed somewhat. In the earlier periods of the League's existence the conclusion of plurilateral conventions had been regarded as the primary object of international cooperation.²² According to the Committee, the methods adopted for achieving this purpose had met with success and continued to be appropriate in certain fields, especially in the control of the drug traffic and in numerous problems connected with the regime of international communications and transit.²³ Later, however, the practice had developed "of drafting model conventions which can be more fully adapted to local conditions, and utilised in a series of similar but not identical bilateral treaties freely entered into by States." This principle had also been applied in certain transit and trade questions.²⁴ But the whole idea that the League's principal task was to promote the conclusion of agreements had become doubtful. "In the early days of the League," the report stated, "it was perhaps too often assumed that international co-operation necessarily implied international contractual obligations and that the success of such co-operation could be measured by the new obligations entered into." ²⁵ Later it had been realized, however, "that many of the really vital problems, by their very nature, do not lend themselves to settlement by formal conferences and treaties—that the primary object of international co-operation should be rather mutual help than reciprocal contract—above all, the exchange of knowledge and of the fruits of experience." ²⁶

Undoubtedly, useful work could be done in this manner. But this type of work made the League appear as an international research institution rather than an agency through which mankind administered its common affairs under the rule of a universally

binding law. It was only in the latter role, however, that the League could have justified the hopes of all those who expected its establishment to introduce a new era in the history of humanity. Nor could the League's vital importance as an instrument of international cooperation be proved by reference to the fact that some bodies forming part of or being affiliated with the League's machinery performed tasks which were more important than the mere exchange of knowledge. The international administration in the field of narcotic drugs, which was set up in connection with the League, was frequently referred to in this respect; that organization exercised a general supervision over the execution of the conventions concluded in this field.²⁷ But the general purpose of the League was not simply to promote effective international collaboration in isolated fields. Such collaboration was possible without a central international organization. The Universal Postal Union worked satisfactorily outside the League. The International Labour Organisation, which was generally regarded as successful in the accomplishment of its tasks, was practically independent of the League. The idea that the League should be a center of unpolitical collaboration was derived from the assumption characteristic of progressive thought, that mankind was united through natural interests of an essentially unpolitical nature, and that consequently all human activities transcending the spheres of states formed an harmonious whole if only the rules of reason were observed. The unity of the world seemed to require a central organization coordinating the agencies through which reasonable solutions of international problems could be reached. The reports of the two Committees mentioned above showed, however, that, within the League itself, the inaccuracy of that concept of the unity of mankind was realized to some extent. The observations made by these Committees lead to the conclusion that in a world divided into independent states a general distinction between political and unpolitical matters was impossible and that the extent to which international collaboration could be successful in a certain field depended on the concrete conditions of the case, which determined the willingness of governments to enter into agreements covering a certain matter. For this reason the special Committee of 1935 suggested that, within the frame-

work of the League, specialized governmental bodies should control different spheres of work. But under these circumstances the usefulness of a central organization, constantly dealing with all problems of a supposedly unpolitical character and trying to coordinate the work of international agencies, could no longer be regarded as generally self-evident.²⁸ Groups of states could be expected to manage common affairs in the way best adapted to the particular cases—if necessary through international organizations and agencies—whenever desirable organizations and agencies set up by the same or different groups of states could establish contacts. To what extent their subordination to common higher organs, whose authority again was only that of the governments represented on them, could be useful also depended on the circumstances of the particular case.

The progressive thinker, who realized the gap between his concept of the oneness of mankind and the disruption of the world into states having particular interests, was inclined to attribute the unsatisfactory state of affairs to a lack of education and knowledge. From the progressive point of view the propagation of knowledge was one of the essential conditions of universal peace and order. Therefore, when the League was established, it soon was considered necessary to provide for a special agency for the purpose of promoting international collaboration in all branches of human knowledge. Thus a Committee on Intellectual Co-operation was set up in 1922, and later an Intellectual Co-operation Organisation was created which comprised certain other agencies besides that Committee.²⁹ The establishment of international relations in the scholarly, artistic, and literary world was regarded as a means of developing what appeared to constitute a fundamental requirement of international harmony: the international spirit (*mentalité internationale*). One problem with which the Organisation was dealing and which seemed to be particularly important with regard to the gradual formation of the international spirit was the instruction of youth in the existence and aims of the League of Nations. The main purpose of this instruction was "to train the younger generation to regard international co-operation as the normal method of conducting world affairs."³⁰ By such training, young people throughout the world were ex-

pected "to acquire the habit of peace" and to realize that they were "growing up in a new era of world history."³¹

Teaching of this kind was not meant to be political propaganda. No definite social program of world-wide scope formed the basis of this education. The youth of the world was to be taught the abstract ideas of peace and universal harmony; the expected result was the formation of a universal public opinion capable of expressing the unpolitical principles of reason and justice. The existence of such a public opinion seemed vital for an institution whose function was "to apply the collective wisdom and conscience of organised mankind to the settlement of all cases where national effort alone must be inadequate."³² The author who thus described the function of the League defined its object in the following terms: "to secure agreement, not to enforce decisions; to help what is good in the nations to assert itself, not to compel the nations to be good."³³ This concept of international organization was very similar to the ideas which Oppenheim had expressed on this subject before the first World War. But the World War had introduced a new element in the thinking on international organization. It had been realized that the world was not yet perfect and, therefore, it was considered necessary to rely on the combined power of mankind for the preservation of universal peace. From the imperfection of the world appeared to result the necessity of supervising and guiding the conduct of the governments of states which were motivated in their actions by the principle of national interest and were inclined to disregard the rights of the peoples subject to their authority. But in the absence of a real world government that supervision and guidance could have been effective only if the imperfect state of the world which made them necessary had already been replaced by the ideal situation as conceived of by the progressive thinkers. It does not matter here whether, as the progressives believed, that ideal situation could ever be realized, or whether it was impossible to expect its realization at any future time. It is sufficient to note that the concept of a universal league of independent states was based on an idea which in itself was contradictory.

14

THE MODERN THEORY OF UNIVERSAL LAW AND THE LEAGUE OF NATIONS; LEGAL MONISM AND THE PRIMACY OF THE LAW OF NATIONS

THE NEW ERA initiated by the creation of the League of Nations seemed to require a revision of the traditional theory of international law as the positivist school had developed it before the first World War. Such a revision was considered to be of more than theoretical interest. Since it was believed that the traditional science of international law had influenced the policy of states which had led to the World War, a theoretical change appeared to have considerable practical importance. Writers in the field of international law generally were well aware of the responsibility which thus was supposed to be resting upon them. They not only emphasized the new rules of conduct which the League Covenant had established, but they also attempted to guide the practice of the states on the road to further progress. An example which illustrates the view point of progressive writers of that period may be found in a passage of H. Lauterpacht's treatise on *Private Law Sources and Analogies of International Law*. In this passage the author dealt with the question of liability in international law. Criticizing the opinion of those who think that "the unorganised character of international law does not permit subtle distinctions between liability based on fault and absolute liability," Lauterpacht declares that "such a point of view should, it is submitted, never be made the starting-point for a juridical treatment of problems of international law. International publicists, when putting forward suggestions with the view to influencing the practice of states, should visualize the international community as proceed-

ing gradually to a stage of organisation with a normally functioning judicial authority.”¹ Two ideas expressed in this passage are of particular importance. It appeared to be the scholar’s task to influence the conduct of states by formulating legal rules, and the formulation of these rules was to be based on the assumption that a situation existed that actually was not realized. The “as if” element, which characterized the League of Nations idea, thus appeared in the doctrine of international law. By strongly accentuating that element, progressive scholars arrived at new theories of universal law which appeared to be in advance of a practice still influenced by older concepts.

In the League Secretariat’s opinion, the Covenant was a compromise between two conceptions—“the old conception of the absolute sovereignty of States and the newer and bolder conception towards which the world is moving—that States must accept some limitations of their sovereignty.”² Progressive internationalists, working after the first World War, had a still bolder idea. In their new theories the term “sovereignty,” as understood by the traditional doctrine, had no place at all, and they rejected the concept of the state on which that doctrine had based its concept of state sovereignty. The new theory was that of legal monism and of the primacy of international law. It was presented in various forms by different writers³ but found its most radical expression in the writings of the French jurist Georges Scelle.⁴ Regarding the international sphere as if it were governed by a legal order essentially similar to the law governing the various national communities, this theory arrived at the conclusion that some ideas which had been deduced from the particular character of international law were incorrect. Among the ideas which now appeared as erroneous was mainly the concept that the international community was composed of states which constituted free and equal single persons. This concept had been developed in Pufendorf’s natural-law theory, which had decisively influenced the positivist school. By rejecting that concept, the new theory went back to Grotius, who had regarded the universal community as a community of members of the human race rather than of states. It has been shown above that Grotius’ concept of the community

of mankind was influenced by the medieval idea of the unity of Christendom, and that he extended this idea of unity to the whole world. Similarly Scelle, the outstanding representative of the new theory, attempted to demonstrate "the existence of that oecumenical community of the *Droit des gens* which takes up and broadens the old juridical construction of Christianity, under the form of a *civitas maxima*." ⁵

There was some similarity between the basic ideas underlying Grotius' theory of law and those of the new theory presented by Scelle.⁶ Grotius had based his concept of law on man's sociability. Scelle based his doctrine on the fact of human solidarity resulting from man's incapacity to live alone. Like Grotius, Scelle derived, from what was considered to be man's natural condition, the idea that there existed a natural law which was anterior and superior to positive law. Unlike the law of nations which Grotius and his followers had developed, Scelle's natural or "objective" law was not regarded as unalterable. It was supposed to indicate those conditions which were best adapted to a given society under certain circumstances and at a certain moment—conditions whose realization guaranteed the progress and development of this society. According to Scelle, positive law constituted a more or less exact "translation" of the objective law which was independent of human will. The fact that this objective law was subject to change left its natural-law character intact; accordingly, the scholar, whose task it was to ascertain the objective law ⁷ and to expose positive law inconsistent with it as "antijuridical," ⁸ appeared again as the highest authority in the legal sphere.

The existence of a universal objective law seemed directly to result from the fact that there were human relationships transcending the limits of the various states.⁹ There seemed to be no reason why this objective law should not be "translated" into a positive legal order of the same kind as municipal law. The existence of such a universal law, however, appeared to be incompatible with the principal tenets of the traditional theory of international law.

According to the positivist theory generally accepted before the first World War,¹⁰ "inter"-national law was a law not above,

but between, states. It was supposed exclusively to regulate the relationships between states, while municipal law regulated the relationships between individuals under the authority of a state and those between the state and the individuals composing it. It then followed that international law could not directly create rights and duties of individuals; only municipal law could have that effect. The states were obliged to conform their internal legal order to the rules of international law, and they could be made internationally responsible for failing to do so. But international law could not directly abrogate municipal law which was in conflict with it, and the individuals as well as the national courts and administrative agencies were bound by municipal law when it conflicted with an international rule.

The adherents of the new theory recognized that it was impossible to conceive of a really binding universal law on the basis of that dualistic or rather pluralistic doctrine which assumed the coexistence of several separate legal spheres—namely, of an international legal order and of various systems of municipal law. Once it was assumed that a universal law actually existed, it seemed necessary and legitimate to proceed to the formulation of legal principles, as if the conditions were fulfilled which within a state made the existence of a legal order possible. Thus Scelle applied to the world as a legal unit the principle that the legal rules of a group forming part of a greater community cannot be in conflict with the legal order of this community itself. "Every intersocial norm takes precedence over every internal norm that is in contradiction with it, modifies it, or abrogates it *ipso facto*." ¹¹ The law of the largest community was supposed directly to affect the smaller group; there was no need for the latter to enact rules in order to conform its own legal order to the larger legal system.¹² The universal legal system, therefore, could confer rights and duties on individuals which were subjects of states. In fact, according to the new theory, only individuals could have legal rights and duties.¹³

This opinion followed from the concept of the state and of corporate bodies in general which Scelle developed in opposition to the doctrine which had attributed to the states a personality

and a will of its own. In Scelle's view the personality and the will of corporate bodies had a purely fictitious character.¹⁴ According to him, these bodies had no separate existence independent of that of the individuals who composed them; their collective will and their collective interests were nothing but the will and the interests of those individuals. In organized groups there existed a difference between private individuals, on the one hand, and agents and rulers of the community, on the other. The legal order determined the legal "competence" of both types of individuals—that is, the legal effect of their actions. The status of the agents and the rulers was characterized by the fact that the law conferred upon them the authority to perform acts which had certain legal effects with regard to the other members of the community.

Thus, the relations with which the science of international law was concerned were necessarily also relations between individuals who, although belonging to different states, were members of the universal community. "For us, the relations which we shall have to describe and analyze are relations *between individuals*, forming a universal society, and at the same time belonging to other . . . political societies . . . which the human community envelops and coordinates and which are governed by its law."¹⁵ Not only were relationships between private individuals the basic element of international intercourse;¹⁶ but only individuals could be subjects of international law.¹⁷ In order to make this situation clear, Scelle decided to use the term *droit des gens* instead of *droit international*, "international law."¹⁸ The idea that the global law was a law regulating the relationships between individuals made it possible to conceive of the world as a legal unit uninterrupted by the existence of national communities. Progressive thinkers of the positivist school always had based their idea of the unity of the world on the fact that there existed contacts between individuals belonging to different states but bound together by common reasonable interests. Legally, however, international relations had been regarded as relations between states. Scelle's theory was intended to demonstrate that also from the legal standpoint individual nationals of different

states were to be considered to be in direct contact with one another.

Within this theory there seemed to be no place for the concept of state sovereignty. Sovereignty, understood as absolute power to act according to one's will, appeared to be incompatible with the idea that human actions could produce legal effects only according to a rule of law, the validity of which was independent of human will.¹⁹ However great the authority of the rulers of states might be, it always was an authority conferred upon them by law. The validity of all legal rules governing particular groups of individuals, such as states, ultimately depended on the universal legal order.²⁰ It was this order, for instance, which was supposed to delimit the respective spheres of authority of the rulers of different states by restricting the legal competence of each of them to a certain territory.²¹

After the elimination of the concept of state sovereignty, it seemed to have become impossible legally to define the state in such a way as to distinguish it from other organized groups of individuals.²² Scelle did not deny, of course, that states had characteristic features distinguishing them from other organizations. But according to him these features were "historico-politiques."²³ Legally, the state was only one of a great number of groups composed of individuals. Such groups existed within, above, or outside the state (such as provinces, confederations, churches), and their rules formed, together with those of the states, a hierarchy of legal orders which culminated and found their unity in the law of the universal community.²⁴

The legal unity of the world thus seemed to be demonstrated by this theory of "monism" which eliminated all fundamental differences between international and municipal law.²⁵ The monistic doctrine made it possible to conceive of a legal order which was *above* the states instead of existing only *between* them. The dualistic doctrine, which had grown out of Pufendorf's concept that states coexisted as naturally free and equal persons, had resulted in a complete separation of the international domain from the sphere of municipal law. Direct contacts between the international legal order and the individuals whose life was regu-

lated exclusively by municipal law were regarded as impossible. Unless such direct contacts existed and the international order could penetrate the states, this order's effectiveness necessarily appeared doubtful. The monistic theory, which considered all legal relations to be relations between individuals, seemed to eliminate the obstacles which the existence of sovereign states had constituted with regard to an effective global legal system. It has been said before that, according to this concept, international rules could confer rights and duties on individuals. There seemed to be no reason why an individual should not be entitled to appeal to the global community against any government including his own whenever his rights were violated by governmental actions.²⁶ Once it was assumed that the individual's status as a national of a state did not separate him entirely from the global community and its law, certain problems arose with which Grotius had dealt but which seemed to have lost all legal significance afterwards. For instance, the question as to how an individual was to behave in case of a war unlawfully undertaken by his government became again a legal problem.²⁷ With regard to violations of the law of mankind committed by governments, the monistic theory allowed the progressive thinker to consider the possibility of making personally responsible the rulers of states who were simply individuals entitled legally to act for other individuals.²⁸

The theoretical possibility of establishing rules which would make the international community similar to the national communities, as far as the character of the legal order was concerned, did not imply that it was always practically feasible under the existing circumstances to lay down and enforce such rules. But Scelle assumed that, even under the prevailing circumstances, there existed a fundamental similarity between the universal law and the legal orders of the various states. The functioning of these legal orders depended on the fulfillment of the legislative, judicial, and executive functions.²⁹ According to Scelle these functions were performed also with regard to the relations governed by the universal law, although in a more or less uncertain and irregular way.³⁰ "It has never been denied, nor could it be

denied, that there might be in intergovernmental relations a formulation of positive law, a jurisdictional control of juridical situations, an executive sanction going as far as the use of force—of war. There is then legislation, jurisdiction, government (in the wide and in the narrow or material sense of the word), complete constitutional activity, both in the societies of the *Droit des gens* and in those of municipal law. *It is only the procedures for realizing it that differ.*"³¹ Insofar as there existed no special international agencies to fulfill the functions which were essential for the effective functioning of a legal order, these functions were supposed to be performed by the authorities of the various states. Scelle here found an application of what he considered to be a fundamental principle—the principle of the duality of functions (*dédoublement fonctionnel*).³² In virtue of this principle the same persons at the same time act as national and international authorities. They act in the latter capacity either separately or in collaboration, as in the case of lawmaking by international agreements.³³ The idea that, in the absence of a supranational organization, the global community had to rely on the rulers of states for the maintenance of its legal order recalls the concept which Grotius developed in his natural-law theory of war. Scelle's ideas concerning intervention and war, in fact, were very similar to Grotius' theory and consequently differed not only from the positivist concept but also from the natural-law doctrine as it had been taught by Pufendorf and his followers. This doctrine, maintaining the exclusive right of each state to be judge of its own actions, had led to the establishment of the principle of non-intervention, which could be disregarded only in exceptional cases. Scelle regarded that principle as incompatible with the idea that the essential governmental functions were performed in the universal domain. "Gouverner c'est intervenir." ³⁴

According to Scelle a rule of objective law provided that "since every government is at the same time a national and an international government, it has competence to maintain and respect international law and to intervene to this end."³⁵ The authority to intervene for the maintenance of the legal order be-

longed to a government even when its own interests were not affected by a breach of law.³⁶ Since law enforcement implied a judgment on the legal situation,³⁷ each government was entitled separately to exercise with regard to the actions of other governments executive and judicial functions on behalf of the global community. The same principles obviously were supposed to apply in the case of war, which constituted the ultimate sanction of the universal law.³⁸ Scelle went even farther than Grotius by stating expressly that the governments were not only entitled but also obliged to exercise the functions which the global legal order conferred upon them.³⁹

Scelle's purpose was to demonstrate the "fundamental parallelism" between international and municipal law.⁴⁰ Like Grotius, he intended to show that the global community could be regarded as a legal unit, although it did not possess an organization of its own. But the viewpoints of the two authors were not completely identical. Grotius had developed a natural-law theory the practical application of which he himself did not expect either in his own or in any future time. He did not suggest any far-reaching measures of improving the organization of the global community. From Scelle's point of view the existing situation was only the starting point of a development which was supposed to lead to a better and really efficient organization of the world. For Scelle wished to prove that the world, although divided into states, could be governed as effectively as a national community, but he was well aware that, under the existing circumstances, the effectiveness of this order was not assured. In fact, his own observations reveal that, under these circumstances, the world still was not a unit, and that his new concept of the state did not eliminate it as an obstacle to universal legal unity.

Scelle maintained that it was impossible to define the state legally once the criterion of sovereignty was abandoned; there were only certain elements of an historical and political nature which in modern times characterized some human groups called states. The most important of these elements was the particularly great legal powers which these groups' highest authorities exercised not only in the natural sphere but also in the international

domain. Scelle therefore declared: "We may define 'states' as collectivities whose rulers have been recognized as holding the major competence of the *Droit des gens*." ⁴¹ This special authority of the natural rulers was an indication of the central position which the states and their organization occupied in the world. "State organization has always played and is still playing the chief role within the community of the *Droit des gens*. From the political point of view it is *the organization of power*." ⁴² The power element inherent in the state was important not only from a political point of view. According to Scelle, power was a condition of the validity of a legal order. In this sense he said: "Power is . . . the basic element of all social organization." ⁴³ The rulers of states were "in fact the individuals who control the material forces." ⁴⁴ Scelle assumed the existence of a universal legal rule which sanctioned this principle. "International Law holds that when social forces are released, imposed, and organized, competence be recognized to belong to those who embody them. Effectiveness is the legal claim of competence." ⁴⁵ *That rule of international law seemed to make it possible to regard the states and their power as having their bases in the universal legal order, just as Grotius' natural-law theory appeared to allow that author to consider the states as subordinated to a global legal system because their formation was regulated by the rules of the law of nature.*

Actually, however, within Scelle's theory the principle of the effectiveness of a legal order could not possibly constitute a rule of law. Scelle obviously thought that effectiveness based on power was a condition which was to be fulfilled whenever a set of rules was to be regarded as a valid legal order. ⁴⁶ The principle of effectiveness, then, belonged to the sphere of the general theory or philosophy of law which defined the elements common to all legal phenomena, not to the sphere of law itself, which Scelle conceived of as a sphere of rules adapted to the circumstances prevailing at a certain time in a particular community. ⁴⁷ But the principle that effectiveness and power were conditions of the existence of a legal order necessarily led to a conclusion that was entirely different from the one at which Scelle had be-

lieved it possible to arrive. If these conditions were fulfilled in the states, then there existed as many legal orders as there were states, and the legal unity of the world which Scelle had intended to demonstrate was not proved.

At any rate, in his theory the states still were to be recognized as powerful units, and as in the traditional doctrine the relations between such units constituted the main problems with which the science of international or global law had to deal. Scelle assumed that states were not persons endowed with a will of their own; but that assumption had only the effect that certain individuals, the rulers (*gouvernants*), who represented the nationals of their respective states, occupied the place which, according to the positivist doctrine, had been held by the statepersons. The observance of the rules of a universal order depended on the decisions separately made by the rulers of each state; in matters regulated by agreements between the rulers of different states, the application of the rules agreed upon ultimately rested on the same basis. The private individuals whom Scelle regarded as subjects of international law were bound to the legal orders of the states on the territory of which they lived.⁴⁸ Thus the rulers of these states actually determined the rights and duties of these individuals. As long as the rulers alone had organized power at their disposal and exercised their authority without coordination, the world remained divided into separate units governed by separate legal orders.⁴⁹ Scelle not only recognized that under these circumstances the application of the global law was initiated by force and political considerations;⁵⁰ he admitted that the situation was anarchical.⁵¹ Anarchy, however, was the "negation of social solidarity,"⁵²—that is, of the element which was supposed to constitute the basis of a legal order.

If there were to be an effective universal law, it seemed necessary to give the global community an organization of its own—that is, to establish a supranational organization. It appeared obvious that the legal unity of the world is not assured "so long as a clearer consciousness of common solidarity has not transformed the interstate procedure into a superstate procedure and

substituted the hierarchy of competences for their concurrent utilization.”⁵³ The “superstate properly speaking, which is the federal state,” was therefore the condition of an effective universal legal order.⁵⁴ Only through a world federal state based on the organized power of mankind could the national communities be really subordinated to the global community and could the direct contact between the supranational law and the private individuals be established, on which the effectiveness of that law depended. So long as mankind did not constitute “un tout politique organique,” the protection of the individual by legal rules superior to municipal law necessarily remained incomplete.⁵⁵

Scelle's idea that the world state was the ideal goal of the development of mankind seemed to conflict with the progressive concept the adherents of which generally rejected that idea. Actually, however, this conflict was not absolute. Scelle evidently believed that in spite of occasional relapses⁵⁶ mankind was steadily moving toward the adoption of better and more effective forms of supranational organization; but he did not expect that the ideal goal of a universal federal state would ever be completely reached.⁵⁷ Scelle did not explain why he thought that the creation of a perfect world state would be impossible. There were, however, some elements inherent in his theory which seemed to make the existence of a real world government appear to be undesirable.

So long as there was no universal organization, the global community could be regarded as united only through the existence of a common, natural or “objective,” law. As was the case in all other natural-law theories, Scelle's natural law was not only supposed to regulate international relationships but constituted at the same time a general standard of justice with regard to the internal affairs and the internal law of the various groups into which mankind was divided, and particularly with regard to the legal condition of the individuals living within states and the liberties to be enjoyed by these individuals.⁵⁸ In this sense the domain of supranational law became “the domain of superlegality.”⁵⁹ According to Scelle, the law of progress required that each individual enjoy “a minimum of social justice and social

liberty,"⁶⁰ that is, a certain degree of liberty allowing him to develop his initiative and personality.⁶¹ The same law required also the respect of "collective liberty,"⁶² which consisted in the freedom of groups of individuals to determine themselves their own way of common life. One of the most important consequences of the principle of collective liberty was the right of self-determination. It was the right conferred by the global law upon the members of a political body to secede from that body and to establish a separate political unity by setting up their own rules, or to join another organized community.⁶³ That right was based on the democratic principles that the will of the people was to be respected and that the rulers were to be controlled by the people;⁶⁴ it appeared as "the transposition into the *Droit des gens* of the democratic principle according to which the governed may grant and withdraw governmental competences."⁶⁵ Scelle's ideas clearly reflected the progressive concept, which established a direct relationship between the realization of the principles of liberty and democracy on the one hand and universal peace and order on the other, and which made the international domain appear as a sphere of justice and liberty. According to Scelle, the enjoyment, by homogeneous groups of individuals, of a certain degree of autonomy satisfied "the need for self-government, which is a condition of progress, of the free development of ethnic characteristics or peculiarities."⁶⁶ Therefore, the supranational organization which seemed required for an orderly application of the rules regarding individual and collective liberties could not have the form of a centralized, unitary world state.⁶⁷ It was the principle of federalism which seemed to make it possible to unite the world in a truly democratic organization which satisfied at the same time the need of autonomy and that of authority and control.⁶⁸ But a real world state, even a universal federal state, necessarily would have given the global community the same type of government which existed within the national communities, that is, a government which seemed to require control by a legal order of a higher kind than municipal law. The existence of a real world government would have deprived the international domain of its character as a sphere of objective law, of justice and liberty. There

are some remarks in Scelle's writings in which this idea seems to find expression.

Scelle defined sovereignty as an individual's power to determine his own legal authority.⁶⁹ The rulers of states would have possessed such a discretionary power if there had not been the universal legal order which defined their authority. The effective limitation of the authority of the state rulers and their subordination to the will of the people depended on the improvement of the global law. Under the rule of an effective global law it was considered possible, for instance, that through the application of the universal principle of self-determination, a principle which implied a rejection of the rulers' sovereignty, the right of the rulers to determine their own legal authority was transferred to the ruled.⁷⁰ In the same sense Scelle declared: "It is in a decrease of discretionary competence (or, if you prefer, of the old notion of sovereignty) that the possibilities for the liberation of peoples lie."⁷¹ The liberation of the peoples of the world was required by the objective law, which was supposed to indicate the ideal conditions of the universal community. It was expected that this objective, natural law would find expression in positive rules, and a supranational organization seemed required for their creation and application. But in the passages where he dealt with self-determination and the liberty of the peoples, Scelle obviously did not assume that the global organization would establish the same relation between rulers and ruled which existed in the national communities when there was no effective global legal order controlling the rulers' activities. Otherwise the rule of universal law would have had simply the effect of transferring from the national rulers to the rulers of the global community an authority which, although theoretically limited by the objective law,⁷² was based on the greatest power in the world and was essentially discretionary.

Scelle occasionally raised the problem of the highest authority and of sovereignty in the universal community. But it is significant that in the only passage where he dealt in greater detail with the question as to whether there was a sovereign in the universal community,⁷³ he actually discussed the authority not of

the supreme rulers of a statelike world organization but of the rulers of states who acted on behalf of the global community. He wished to make it clear that they could not be regarded as sovereign even when they acted in that capacity, and he concluded his observations on that subject by stating that "to want to maintain the notion of state sovereignty is to deny the existence of international law."⁷⁴ When Scelle spoke of sovereignty, he obviously had in mind mainly the national communities and their rulers. His principal purpose was to prove that these rulers were not sovereign—that is, exercising a wholly discretionary authority—but that they were subject to law, and he evidently believed that once this was proved, it was demonstrated that there were no sovereign individuals or communities in the world. Then it seemed to become possible to expect that eventually all human actions would be regulated by law and that thus the law would appear as the real sovereign of the world.⁷⁵ Scelle used the term "law" equally for objective and positive law, and when he spoke of law in general it was, therefore, not always clear whether he meant the one or the other kind of legal order. On the one hand, the law which he considered to be sovereign clearly was the ideal objective law. It was on this law that ultimately depended the unity of the universal community, when there was no real world government. On the other hand, Scelle thought that a strengthening of supranational organization, on which the growth and enforcement of positive rules depended, was necessary in order to establish the sovereignty of law firmly. The ideal solution of the problem of universal peace and order seemed to require an organization which, although really supranational, was not a world government and therefore did not eliminate completely the objective law as the ultimate principle of universal unity. An organization of this type seemed already to exist. Scelle considered the League of Nations to constitute a supranational phenomenon, although not a superstate.⁷⁶ It evidently was rather a more perfect League than a world state which appeared to him as the ideal form of world organization.

The existence of the League strongly influenced Scelle's way

of thinking and determined the direction of his argumentation, which is not always easy to follow. That institution seemed to be the first decisive attempt made by the peoples of the world to establish a truly legal world order supported by an appropriate organization. It was hardly possible, however, to assume that the League had fundamentally changed the conditions of the world by introducing the rule of a supranational law which had not existed before. If only the League had assured the existence of a universal law, then it would have been necessary to admit that before the League's creation no real legal order of world-wide scope had existed. This admission would have been clearly incompatible with the idea generally maintained by progressive scholars that the first World War had been waged for the maintenance in the world of the rule of law. Moreover, from the point of view of those scholars, it would have been difficult to assume that the relations between states members of the League and nonmembers, such as the United States of America, were not regulated by a common law which existed outside the League Covenant. But, above all, the League of Nations, regarded by Scelle as a supranational phenomenon, actually had not changed so fundamentally the structure of the world as to eliminate the scientific problem of the legal character of a law binding upon independent states.⁷⁷ Scelle, therefore, necessarily had to prove that such a law could exist under the circumstances which had characterized the community of states before the League was established and which still prevailed after the creation of this organization. The doctrine of the duality of functions performed by the national rulers seemed to make it possible to regard the global community as organized although it had no organization of its own. Scelle thought thus to have demonstrated the fundamental parallelism between municipal and international law, which he affirmed corresponded "to the reality of human relations."⁷⁸ But Scelle admitted that neither the rulers of the states nor the private individuals were always aware of this reality,⁷⁹ which was obscured by the erroneous concepts of state personality and sovereignty. It was not only the lack of theoretical insight, however, which was responsible for the unsatisfactory condition of

the world. The absence of an effective global organization, corresponding to the global legal order, resulted in a condition which Scelle himself described as anarchical, because there was not sufficient coordination between the activities of the various national rulers who retained an essentially discretionary power. Scelle, therefore, regarded the world which had no organization of its own as if it were governed by a legal order comparable to municipal law; but actually the rule of law was not assured under these circumstances.

According to his own theory, a truly supranational organization seemed required for the establishment of a real legal order of world-wide scope that would restrict the arbitrary power of the rulers or their sovereignty more effectively than was possible under the regime of the duality of governmental functions. Thus the elimination of sovereignty appeared to be not a matter of right reasoning but rather the expected result of an historical development leading to a better organization of the global community. Scelle tried to demonstrate that such a development was possible,⁸⁰ and his observations regarding the rule of law in a world which did not have its own organization were mainly intended to show that the elements already existed out of which a more perfect legal order could grow. The importance of that demonstration becomes clear if one considers that progressive thinkers tended to regard the division of the world into fully independent states as a natural condition of mankind and, therefore, to reject the idea of a truly supranational organization.

Scelle intended to show that such an organization could be created. He maintained that the fundamental parallelism between the global law and the legal orders of the national communities could and should find expression in similar institutions and methods of government. This idea inevitably led him to the conclusion that the world state was the goal of human development. His theory failed to make it clear how, without such a state, a supranational organization and, therefore, the rule of law in the universal community could be established. But the universal superstate appeared to Scelle not only to be practically unattainable, but its existence seemed also not completely com-

patible with his ideal concept of a world community entirely regulated by law and guaranteeing the liberty of individuals and peoples. Thus finally appeared as the ultimate goal a world organization which was not a superstate but which was supranational and was supposed to guarantee the maintenance of peace and order in the same way as a state. Even Scelle's concept of the world's ideal condition, therefore, shows the same "as if" character as his interpretation of the existing situation. He expected a universal organization to operate as if conditions existed which actually were not to be realized.

There was a direct relationship between this "as if" character of Scelle's theory and the manner in which he proposed to solve by legal procedures the various problems arising in the international domain. He considered these problems as they presented themselves in the "anarchical" condition of the world and invariably suggested for their solution the creation of a supranational legal machinery. For instance, following the progressive tradition, he regarded the freedom of international commerce as the fundamental condition of the existence of the universal legal community; he even assumed that the principle of free intercourse was sanctioned by a legal rule which he described as the basic rule of the global law.⁸¹ But under present conditions the application of that rule was left to the discretion of the various national governments, which generally used their power to further the immediate interests of their respective states. This "regime of anarchy"⁸² was bound to disappear when there was "a *superstate organization* capable of serving the general interest and international solidarity."⁸³ It obviously did not occur to Scelle that in a world community so organized that a higher organ could authoritatively determine the trade policy of the national communities, this policy might no longer constitute the same problem as in the state of international anarchy.

Scelle's reasoning, which in this respect was typical of the thinking of the period between the two World Wars, was characterized by the belief that a better organization of the world did not imply any fundamental change in existing conditions. The particular problems with which the science of international

law dealt arose from the fact that there was in the world no organization outside the states and their governments, the interests of which frequently seemed to conflict. It might have been expected that once a supranational organization existed the whole situation would change. When several states became united in a greater political body such as a federal state, the maintenance of law and order in the larger unit evidently is impossible so long as the divergent interests of the entities which previously had been independent states constitute the main source of political conflict. The larger unit can exist only if the political division of the population generally follows lines other than those determined by the division of the state into regional units, that is, if the individuals do not regard their essential interests as identical with those of the respective legal units to which they belong. When the central authority is firmly established, the exercise of this authority is likely to constitute the most important object of political struggle, which in this case is carried on by political parties whose programs are essentially determined by other than regional interests. A federal constitution can regulate problems which may seem to be somewhat similar to those which arise between independent states not subject to any higher authority; it can for instance provide for the revision of the frontier between two member states. But the political aspect and importance of these problems will be different in the two cases. Scelle evidently expected a supranational organization, whose establishment he constantly proposed, to modify the problems which had existed previously insofar as they lost their political character and became legal questions. But he obviously thought that they would remain the essential problems with which mankind had to deal, although he seemed to share the progressive belief that common interests were steadily drawing the people of the world more closely together. The practical value of his suggestions for an improvement of the international situation was, therefore, extremely doubtful. The principal problems which he intended to solve always were those of the unorganized global community, such as war, treaties, self-determination of peoples wanting to establish an independent state of their

own. By merely suggesting that the community should be organized, he actually did not contribute to the solution of the problems as they existed; he rather postulated their nonexistence as political problems. Since in his concept the international situation remained substantially the same when the global community was organized, he paid no attention to the question as to how the political conditions would be created and maintained on which a supranational organization was to be based, and how to deal with the new problems which were bound to arise if it were possible to establish such an organization. Consequently, his observations generally applied neither to conditions which actually existed nor to a situation which reasonably could be expected to exist in the future.

Scelle's way of thinking in this respect evidently was influenced by the progressive concept, the adherents of which always had expected that politics would gradually disappear from the international sphere. This process was supposed to lead to the rule of universal law, without fundamental modification of the structure of the global community. Progress was expected to eliminate the factors which in the past had disturbed the natural harmony between the interests of the organized groups into which mankind was divided. It was this progressive concept which had made it possible to believe that the League of Nations, an association of independent states, was a practical solution of the problems resulting from the coexistence of independent states. Scelle's theory was an attempt to prove the importance of the League as a starting point of a development leading to a better future through an organization which, although not a superstate, performed the functions of a state. The idea that universal peace and order did not depend on any essential change of conditions made the League of Nations concept so generally attractive. No political action involving the risks and the struggles which such action ordinarily implied seemed necessary to bring about the ideal situation. It was often asserted that the realization of that concept required certain sacrifices on the part of all concerned. But it was understood that primarily erroneous conceptions were to be sacrificed, and that by giving them up every nation and,

therefore, every individual would be able more securely to enjoy what they had had before.

Accordingly, the improvement of the methods of the supranational organization was not supposed to produce any radical change in the way of life of the different nations. They were expected to retain their independence within a global community which guaranteed a harmonious coexistence of the groups composing mankind.

SOME CONCLUSIONS: UNITED NATIONS AND WORLD STATE

THE LEAGUE OF NATIONS was expected to guarantee, through the rule of a universal law, general peace and order in the world without requiring from anyone the sacrifice of reasonable interests. The purpose of the present study was to describe and to explain the growth of the pattern of thought on which this idea of a universal organization was based, and to demonstrate to what extent this idea was contradictory in itself.

The formation of that pattern of thought was determined by the concept of natural law combined with the belief in human progress. On this basis the idea arose that, at least in a primitive stage of development, there existed a universal law in a world divided into independent states, a law which was characterized by particular dignity. The League of Nations was intended firmly to establish the rule of this law. In the preceding chapters the theoretical development has been described which led from the medieval concept of unity achieved through the Christian faith and its guardians, the Church and the Pope, to the progressive idea that the whole world formed a community kept together by the natural interests of the peoples and governed by a universal law which expressed the standards of reason, liberty, and justice and whose observance was assured by the authority of public opinion.

Progressive internationalists generally regarded the universal legal order as a system of positive rules. But in the absence of a statelike world organization, the global law could not be positive in exactly the same sense as municipal law. The progressive theory of global law conceived of legal rules the creation and application of which ultimately depended on the voluntary ac-

ceptance of the standards of reason and justice by those whose actions were to be governed by those rules. The universal law thus appeared to show the characteristic features of a law of nature and reason; it was conceived of as a positive law raised to the level of a law of reason. When they tried to demonstrate the existence of such a legal order, the progressive internationalists were facing an unsolvable dilemma. The law of the universal community, which itself was not a state but was divided into political bodies organized as states, necessarily was to be regarded as different from the law which existed within these states; it seemed even to be undesirable to make the universal law so similar to municipal law that it lost its particular character of a law of reason. But, on the other hand, it was assumed that the global legal order was legal in the same sense as municipal law and that in its particular sphere the former could essentially perform the same functions which the latter performed within the national community. The division of the world into states seemed to leave to the universal law only the task of regulating relationships between these units; but the assumed similarity between the universal law and municipal law appeared to require the existence or at least the gradual development of a community of mankind that was to be in contact with, and to establish direct legal relations between, the members of the human race. It is clear that difficulties were bound to arise from such an attempt to combine in the same theory two different concepts of law.

The problems which here appeared might seem to be essentially theoretical. Scholars of international law observed the fact that states, through their governments, concluded agreements couched in legal language, and that in a great number of cases the contracting parties abided by the terms of these agreements. Moreover, there were more or less well-defined rules not laid down in treaties, to which frequently reference was made in the practice of states. It seemed possible to deduce from these facts the existence of legal rules in the international sphere. To satisfy the requirements of scientific precision, the scholars tried to find a definition of law which covered the international rules as well as those of municipal law. The whole problem thus could

seem to amount to a mere question of definition and to be of essentially academic interest. Actually, however, it became a question of great practical importance. Under the influence of the progressive concept, the assumption that there were contractual and customary rules of international law led to the idea that these rules were part of a universal legal system just as the rules of municipal law were part of a legal order showing a certain degree of systematic unity. While in the national domain this unity was achieved through a certain type of organization, it was supposed in the global sphere to result from fundamental principles of universal validity which, however, in fact were formulated by the individual scholar in accordance with his concept of law in general and of global law in particular. In spite of theoretical controversies which arose between various schools of international law and frequently between the adherents of the same school, progressive internationalists agreed as far as the existence of a universal legal order was concerned. It was this theory of a global legal system existing without a statelike organization which made it possible to believe that an institution like the League of Nations would maintain the rule of law in the world and would strengthen it to such an extent that eventually the political problems of the international sphere would generally be transformed into legal questions of the same type as those which arose between private individuals within the national communities.

The League of Nations was also an organization, but it was a kind of organization different from that existing in its member states. The global community organized in the League was not a political body in the same sense as these states, although it was supposed to perform similar tasks. They were to be performed through quasi legislation, quasi administration of justice, and quasi government. The belief that these procedures would produce the same effects as those which, within the states, were the result of legislation, administration of justice, and government was based on the concept of man as an essentially reasonable being. This concept was the basis of the natural-law theory. The idea of progress had produced the hope that, as far as the uni-

versal community was concerned, the natural, reasonable, ideal person gradually was emerging as a normal, typical phenomenon. Reasonable persons were supposed, if left free from irrational restraint, to be guided in their actions by their reasonable, natural interests, which were regarded as being in natural agreement with those of other reasonable persons. It was assumed that there existed a world-wide natural community of interests, and that by reasonable peaceful cooperation the interests of the peoples of the world could be satisfied to the highest possible degree. The fact that in the past it was impossible to maintain the harmony of the world seemed the result of some specific conditions, such as autocratic government, arbitrary restriction of international trade, and disregard of the nationality principle—conditions which had prevented mankind from acting in accordance with its natural interests. Their gradual elimination was hoped to make what the peoples actually regarded as their interests coincide with their reasonable interests. Then it seemed possible to assume that a situation would arise in which everyone was satisfied and no one, therefore, was likely to disturb the universal harmony through actions incompatible with the common interest of mankind as well as with his own interest. Such a situation would be expected to satisfy not only the material interests of anyone concerned but also his sense of justice, since a condition in which all found equally their advantage was to be considered as just by all normal persons. It was this prospect of a future situation progressively developing without any fundamental change in the division of the world into separate groups, and automatically satisfying all these groups, which made the progressive concept so generally attractive. Since this situation was supposed to be in accordance with universal reason, it did not appear to be a mere phase in the political history of the world; it was to be regarded as the goal of the progressive development of mankind, as its ideal condition, the one ultimate solution of all world problems which had their source in political controversies and struggles. If an organizational framework was found necessary to permit mankind to maintain the natural harmony, then it seemed logical to assume that there existed also one ideal

method of solving the problem of international organization. The various schemes proposed by progressive thinkers generally were based on the idea that there was one reasonable ideal solution of that problem, and that because of its reasonableness this solution should be generally acceptable. The League of Nations was the first attempt to apply a scheme of this type in practice. It could be regarded as an appropriate organization of the global sphere only if the ideal situation as conceived of by progressive thinkers were already reached. For the League only provided for a machinery through which essentially rational persons could arrive at reasonable agreements concerning their common affairs. The institution was to function, however, in a world in which progress evidently had not led to the ideal condition of general reasonableness. The relationships between states still were characterized by political disunity—that is, by the absence of that general agreement which the concept of the reasonable, ideal person implied and which was a necessary condition of the satisfactory working of an institution of the type of the League of Nations. It was just this state of affairs which seemed to require the creation of such an institution. Here was the source of the unsolvable conflict indicated above, which was inherent in the League of Nations idea; the League could be expected to work only if the conditions did not exist which appeared to make the existence of that organization necessary.

The fact that the League was not based on one single coherent concept has, of course, frequently been noted. Friends of the institution pointed out that the League Covenant was the result of a compromise between idealism and realism, a compromise made necessary by the still imperfect condition of the world. This condition seemed to have required the sacrifice of principles which would have made the League an ideal institution. From this point of view, that institution appeared to be not a final solution but only a first step toward the establishment of an ideal organization, the best organization possible under existing circumstances. Its improvement, then, depended upon the steadily continuing progress of mankind. Without examining the question of the supposed influences of realism and idealism on the

various provisions of the Covenant, it may be stated, however, that that instrument cannot be regarded as the result of a compromise in the sense indicated above. What characterized the League of Nations concept in general was the combination of two ideas incompatible with one another. The League was an attempt to deal with the problems arising from political divergencies between the states into which the world was divided, by methods the successful functioning of which presupposed an essential unity of purpose among the peoples of the world, and therefore the absence of political discord. Without having reached the highest degree of perfection mankind could not hope, through the League, to perform the tasks which this institution was supposed to accomplish. It may be argued that internal inconsistency is typical of political concepts and programs, and that nevertheless these concepts and programs frequently form the basis of definite political actions and movements. The League of Nations idea, however, was not a political concept or program. It was rather an unpolitical concept. It did not call for any political activity designed to alter the existing political situation in accordance with a concrete program. The League was designed to bring about the reign of abstract reason, justice, and peace, and its Covenant was based on the belief that all the problems of the world could find some generally acceptable solution through a machinery which essentially left the world in the same condition which had prevailed before the creation of the global organization.

As far as the internal affairs of the states were concerned into which mankind was divided, an organization of the type of the League of Nations obviously was not sufficient to maintain peace and order. In the view of progressive thinkers the existence, within each of the various national communities, of a liberal-democratic form of government was an essential condition of international peace, and this form of government was supposed to allow the people freely to express its will and to manage its affairs in accordance with the reasonable interests of the community. But within the states the liberal-democratic principles, which served to support definite social and political programs,

were principles of government, and their application necessarily was to be reconciled with the requirements of effective government. Progressive internationalists generally did not assume that, in the national domain, these requirements could be satisfied without a state organization, nor did they expect that the progressive development of mankind would make such an organization unnecessary in the future. The progressive's belief in liberal-democratic institutions, therefore, did not make more consistent his idea that in the global sphere a legal order could exist, an order which for its effectiveness ultimately depended on general reasonableness and voluntary abidance by reasonable rules formulated with the consent of all concerned. In order to avoid a possible misunderstanding, it may be appropriate here expressly to state that the demonstration of the inconsistency of the internationalists' concept, just because of that concept's inconsistency, does not imply the denial of the validity of the ideal principles of government which had their source in the natural law doctrine—that is, the principles which were based on the recognition of man's dignity and of his need of a sphere of personal liberty.

The idea that the existence, within the various states, of a reasonable form of government was a condition and guarantee of universal peace and order and the belief that this form of government became more and more generally accepted were essential elements of the League of Nations concept. However contradictory this concept was, it combined several ideas in such a way that it had at least the appearance of consistency. If the validity of one of these ideas were doubted, the whole concept could not possibly be regarded as plausible. The progressive pattern of thought, in the stage of development which it had reached at the end of the first World War, appeared to support the hope that a working global organization could be based on the principle of cooperation between independent states. The establishment of the League of Nations cannot be understood without reference to the progressive pattern of thought which culminated in the League concept. When, after the second World War, a new attempt was made to organize the world in a similar way, the situation had changed somewhat as far as the

prevailing ideas were concerned. The Charter of the United Nations, therefore, cannot be traced directly back to the progressive concept. This concept rather influenced the creation of the new institution indirectly through the League of Nations. For this reason the League idea, rather than the United Nations concept, has been analyzed in the present study, which intends to contribute to an understanding of the belief that an association of independent states is the ideal form of organization for the community of mankind.

The United Nations Charter is based on that belief. Like the League of Nations, the United Nations organization is intended to become an organization of the community of mankind. The Charter's Preamble states that, "We the peoples of the United Nations . . . have resolved to combine our efforts to accomplish" certain tasks. Here the term "peoples" is used in order to make it clear that masses of individuals rather than states constitute the basic element of the organization.¹ The Charter to which the governments of the peoples have agreed does not establish, however, a superstate eliminating the existing independent states and thus merging the various peoples in one people. The United Nations organization "is based on the principle of the sovereign equality of all its Members."² The community of peoples is organized as an association of sovereign, independent states.

The general ideas underlying the United Nations organization obviously were similar to those on which the League of Nations concept had been based. When the United Nations organization was established, the idea still was alive that the global sphere was a sphere of reason and liberty, and that the maintenance of universal peace and order depended on the observance of the principles of reason and liberty in the formation and the government of the political communities which were members of the institution. In the Preamble to the Charter, the peoples express their determination to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person," and to "promote social progress and better standards of life in larger freedom." According to Article 1, one of the "appropriate measures to strengthen universal peace" is the development of "friendly

relations among nations based on respect for the principle of equal rights and self-determination of peoples." "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples," the United Nations have undertaken to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." ³

The adherents of the League of Nations concept not only maintained that there existed a relationship between universal peace and order, on the one hand, and the respect for the principles of individual liberty and self-determination, on the other. They also assumed that, however unsatisfactory the existing conditions still were, considerable progress toward the general application of those principles had been made and that further progress in the same direction was assured. This assumption was an essential element of the concept of world organization, and without it that concept was hardly understandable at all. But the conditions which, after the first World War, seemed to support this belief in progress no longer existed when the United Nations organization started its work.

After the close of the first World War the liberal-democratic institutions existing in Western Europe and in America showed a general pattern of government which, in spite of all differences, was considered to be uniform enough to represent the one reasonable governmental system and, therefore, to serve as a model to be imitated by less advanced states. Most of the victorious nations seemed to govern themselves freely, and the rest of the world was expected to follow their example. The new states which were created in Eastern Europe in accordance with the principle of nationality and self-determination were adopting constitutions inspired by liberal-democratic ideas. It was expected that if in the future other peoples would acquire their independence, they automatically would govern themselves in that reasonable manner which was most beneficial to themselves and to the world as a

whole. A reasonable system of government was supposed to leave the individuals free to seek their economic advantage in their own countries as well as abroad; economic liberty of the individual was an indispensable condition of the satisfactory functioning of the economic system which, in the progressive concept, appeared as the fundamental basis of a peaceful unpolitical community of mankind. The first World War had made restrictions of economic liberty necessary and had caused a dislocation of international economic intercourse, but it appeared reasonable to hope that it would be possible at least to reestablish the prewar practice which, although not ideal, seemed to have produced satisfactory results. It is true that in one big state, in Russia, a revolutionary regime had been established whose principles were in direct opposition to those of Western democracy. But this fact did not appear to invalidate the progressives' hopes for a world united by the same standards of reason and liberty. Russia at that time was relatively weak, and the outcome of her revolutionary experiment could still be regarded as uncertain.

The changes are evident which had taken place in these conditions at the time when the United Nations came into existence. It could no longer be maintained that mankind was united by common standards of government, or at least that it was progressing toward the general acceptance of the same governmental type, the type which progressive thinkers had regarded as the only reasonable one and as a condition and guarantee of universal peace. It had become difficult to believe that every people, when liberated from oppression—especially from foreign rulership—inevitably would adopt such reasonable institutions. Moreover, it was no longer easy to imagine that, in a world torn by antagonistic political ideas and forces, liberation from a certain type of rulership automatically would give a people that freedom of choice between different regimes which, in the progressives' view, was an indispensable condition of choosing reasonably. It was obvious that economic liberalism of the kind which had appeared as the ultimate guarantee of a generally satisfactory world order would not become a general principle of policy after the war. Even in

most of the countries whose regimes were not totalitarian, non-interference was no longer generally accepted as the reasonable solution of economic problems.

The progressive pattern of thought, on which the League of Nations concept had been based, therefore, was no longer intact when the United Nations organization came into existence. There was no other concept from which the idea could have been derived that an association of independent states was the ideal instrument of universal peace and order. The ideal picture of such an organization was still the same. It was the picture of a world community in which independent states no longer tried to satisfy their particular political interests by political methods but acted in accordance with the common interest of mankind under the rule of a universal law. The organization was not a superstate but "a center for harmonizing the actions of nations in the attainment" of common ends.⁴ The progressive concept analyzed in this study was the theoretical basis of the United Nations organization. But since the optimistic assumptions which had been its essential elements and which had made it appear plausible could no longer be reasonably maintained, the concept had lost even that degree of coherence which, in spite of its internal contradictions, it had possessed before.

The United Nations Charter was the second attempt to give the global community an organization. The first attempt had failed completely as far as its ultimate purpose was concerned. But the fact that an institution of this type had existed before, and that it had worked and produced some results in various fields, could be regarded as a proof of the general feasibility of a similar scheme. It then seemed possible to attribute the failure of the League properly to fulfill all its tasks to certain defects of its constitution and to certain unfavorable circumstances, such as the absence of the United States from its membership. This way of thinking appears decisively to have influenced the establishment of the United Nations organization. The feasibility of the general scheme was widely taken for granted; what remained to be done in order to produce a more satisfactory solution than that which the League had offered seemed to be to make use of

the experience which the history of the League provided, and to build up a better organization on the basis of this experience. For this reason it has been said above that in order to understand the United Nations concept one has to go back to the League of Nations rather than directly to the progressive pattern of thought, from which the League idea was derived.

What mainly distinguishes the United Nations Charter from the League of Nations Covenant is the attempt to make collective action for the maintenance of peace more effective. The new organization, therefore, essentially is a stronger League. It has been explained above ⁵ why the idea that the League was to be strengthened by heavier obligations to be imposed on its members increased the contradictions inherent in the League concept. Like the League, the United Nations organization requires for its satisfactory functioning the existence of a fundamental harmony and unity of purpose among the peoples into which mankind is and remains divided. The necessity of making an organization of this type strong implied the absence of those conditions on which its working depended. In fact, when the United Nations organization was established, there was less unity in the world than in 1919, or at any rate the disunity was more apparent. The internal conflict which characterized the League of Nations idea is even more pronounced, therefore, in the case of the United Nations.

It has sometimes been said that whatever certain provisions of the United Nations Charter may state with regard to the sovereignty of the member states, other clauses clearly imply a surrender of sovereignty on the part of the states not permanently represented on the Security Council ⁶—that is, of the states other than the Powers without the consent of which the Council could not arrive at a decision. In this respect reference is made especially to Article 24 (1) by which the organization's members "confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." It seemed possible to assume that the Charter thus provided for a central organ which, if it did

not transform the international community into a superstate, at any rate made this community more similar to a state than it had been before. *If this assumption were correct, it would be impossible to compare the United Nations to the League and to apply the same kind of criticism to the two organizations. In fact, however, the Charter has not fundamentally altered the condition of the world which had existed before the creation of the United Nations.* A Great Power often had forced a weaker state to adopt a certain course of action, and all Great Powers acting in concert ordinarily had been able to impose their decisions on small countries. This state of affairs was not considered incompatible with these countries' independence and sovereignty. Independence and sovereignty could not possibly mean that each state under all circumstances was free to act as it pleased. Not even one of the Great Powers enjoyed such a complete freedom of action. What characterized a world divided into a number of states was the fact that only in groups of limited size existed an organization capable of assuming a general responsibility for an orderly community life and making possible authoritative decisions on questions of common concern. Consequently, each of these groups, acting as a unit, ultimately determined for itself what its particular interests were and tried to satisfy these interests as far as existing conditions permitted. If a state's conduct did not seem satisfactory to other states, the only means of compulsion consisted in an action taken by these other states. They could be expected to act only in accordance with interests defined by them, and the success of their action depended on the general political situation. This condition of the world is not changed fundamentally if states, in an agreement of the type of the United Nations Charter, undertake to abide, with regard to certain narrowly limited although highly important matters, by decisions on which the Great Powers happen to agree. The main international problem results from the fact that there is no permanent agreement between Great Powers, and this problem is not solved by any of the provisions of the Charter. There is in this regard no essential difference between the United Nations organization and the League of Nations. What seemed to supporters of the new institu-

tion to constitute a surrender of sovereignty on the part of some states at least does not transform the international community into a world state. Only a world state, however, would make it possible for the existing states to give up the authority which they exercise in their respective domains. Surrender of this authority to an "international" organ is inconceivable. It would result in the complete elimination of those institutions on which orderly community life depends.

It is not intended here to suggest that the United Nations organization never could have any practical importance. It would be quite possible for a member state or a group of member states to use that organization for their particular political purposes, which might include the maintenance of the peace of the world. But such a political use of the organization obviously would not correspond to its ideal purpose. Nor could the new organization in any case guarantee the observance of a legal order similar to that existing in a national community.

There is now a growing current of opinion based on the recognition of the fact that in the global sphere only a world state could perform those tasks which are performed by the individual states in their respective domains. The most advanced position is no longer that of the supporters of the United Nations, but that of the advocates of a superstate. In this respect the present situation differs from that existing after the first World War; at that time, the idea of a world state was generally rejected.

If a world state could be established, the conditions of peace and order which it would produce obviously would be different from those which the League of Nations and the United Nations were expected to bring about. Whatever its particular form may be, a world state would be a state like any national state. Its organization providing for a unity of decision on matters of general concern to the global community would lead to the establishment and maintenance of a more or less coherent legal order. It may become possible to a certain extent to separate the legal and the political spheres. But this separation would never be complete. The legal order of a state necessarily reflects certain concrete social and political conditions, and its effectiveness depends

on the existence of these conditions. The progressive thinker's hope that politics would disappear from the global sphere was based on the belief that the common interest self-evident to reasonable beings automatically would unite mankind in a manner which was satisfactory to everyone. But in a state the harmony which the maintenance of peace and order requires has to be created through constant adjustments to changing circumstances and changing political ideas. The common interest must be determined authoritatively, and this determination ordinarily is the outcome of a political struggle between groups which represent different interests and either divergent concepts of social justice or at least divergent interpretations of a common concept. This struggle has as object the policy of the state, on which ultimately the particular type of the state's legal order depends. The justness of the law in force within a state can always be challenged from a concept of justice different from that on which that law is based. But this challenge will bring about effects only if political methods are used and, if it is effective, it will again lead to a legal regime which depends on certain political conditions and, together with these conditions, can be attacked as unjust. Political action, of course, does not necessarily involve violence. The modern state of the type which Western civilization has produced provides for procedures by which political changes can be brought about in an orderly manner. But the action causing these changes is nevertheless political action, whose object is the acquisition of power and its use in a certain manner.

If this difference between a world state and the unpolitical global community as conceived of by progressive thinkers is kept in mind, it might be assumed that the advocates of a universal superstate definitely have abandoned the concept which was based on the League of Nations idea and which influenced the creation of the United Nations organization. Actually, however, this is not the case. *The world state* obviously constitutes, in the view of many of its supporters, the one reasonable and ideal solution of the international problem, which progressive thinkers always had attempted to find. It is true that formerly progressives generally had rejected the idea of a world state, which they re-

garded as inevitably implying a system of universal oppression. The supporters of that idea, on the contrary, see in real world government the only guarantee of universal peace and order. But they consider *the* world state in the same abstract manner in which the progressive thinker always used to discuss the problem of international peace.

The opinion that the universal state is the reasonable solution seems to rest on a firmer basis than the League of Nations idea. Advocates of the world state can point to the fact that the League of Nations idea is impracticable, and that the universal association of independent states cannot eliminate the danger of the constant recurrence of wars between separate political bodies nor create such conditions of law and order as normally exist within national communities. The perfection of destructive weapons, the use of which could not be restricted to the armed forces of the belligerents but could be expected to wipe out whole peoples, appears to have made the elimination of war a condition of the survival of mankind. The general interest in peace, which progressives always had regarded as natural, now seems to have become so urgent that no reasonable person who wants to preserve his life can possibly disregard it.

From these considerations many of the supporters of the world state draw conclusions typical of the way of thinking which had developed under the influence of the natural-law doctrine and the idea of progress. That way of thinking led from the recognition of the fact that peace and order were required in a human community to the assumption that there existed an ideal condition of peaceful community life which was evident to reason and was likely to be realized if the persons concerned were reasonable and willing to act in accordance with rational principles. Only that assumption appears to explain certain hopes which many adherents of the world-state idea seem to entertain. They evidently hope that the world state will arrive when groups of reasonable people of good will enlighten the world with regard to the advantages of universal government, express their desire to see such a government set up, and urge their respective governments to cooperate in its creation. It obviously is expected that

these efforts will lead to a general agreement by which the individual states surrender to a central authority that part of their sovereignty which enabled them to have an independent foreign policy and to exercise a control over weapons of war. Transfer of sovereignty by agreement seems to be preferable to any other method of creating a world state not only because it is a peaceful procedure but also because it seems to guarantee the reasonable solution of the problems with which mankind has to deal, because it appears as the outcome of decisions freely made by the various people after they have become convinced of the necessity and reasonableness of this solution. World government thus conceived is supposed to provide the correct answer to the question as to what constitutes the ideal organization of mankind. The search for this answer is based on the idea that it is only necessary to find the right solution of the organizational problem in order to make it possible for mankind to conduct its affairs in a peaceful and reasonable manner. Accordingly, the supporters of world government evidently expect that the central authority set up by consent of the peoples will exercise its power in the general interest of mankind, that, particularly, it will satisfy mankind's interest in universal peace, and that it definitely will remove the threat to the existence of the human race which the invention of new weapons has created.

The world state regarded as the ultimate solution of the problem of world peace, the world state established by agreement, is believed to assure the ideal combination of authority and freedom. The freedom of the various peoples is considered to be guaranteed by the federal character of the world government to which these peoples surrender only the rights indispensable for the fulfillment of its tasks. It seems safe to assume that many of the advocates of this scheme believe that its realization would guarantee the maintenance of peace, but that otherwise the various peoples on the whole would continue to live as they did before. This world state-idea may be compared to that developed by Scelle who, as shown above, conceived of a universal government which would not change fundamentally the conditions prevailing before its establishment, but would make possible the legal

solution of the same problems which, resulting from these conditions, had been the source of political disputes. It was this idea, that a global organization could assure peace among peoples preserving their way of life, which had made the League of Nations concept so generally attractive. This idea, applied to the world government, explains why many advocates of such a government think it possible to set up an organization of this type after convincing the masses as well as the governments of its necessity but without preparing for its establishment politically.

If it is realized what a world state really means and what distinguishes it from an ideal scheme of the type of the League of Nations, it should be clear, however, that the world-state problem must be approached in a different way. The division of the world into states rests on concrete political and social conditions. Without a change in these conditions the creation and maintenance of an effective world government seems impossible. Such changes can be brought about only by political action. Persons and groups which engage in such a more or less revolutionary activity will find themselves in opposition not only to those who want to preserve the *status quo* but also to those who want a universal state—but one of a different kind. In fact, if those who are suspicious of Russia's policy interpret correctly the plans of the Soviet government and the role assigned in these plans to the Communist parties of the various states outside Russia, then there exists a political movement having as its goal the establishment of a type of world government which by many adherents of the world-state idea, as analyzed above, is regarded as undesirable even if it should produce universal peace. Supporters of this idea probably would object to any comparison between their scheme, to be based on a free agreement among the peoples of the world, and the concept of universal Communism, which is a concept of world domination to be established by subjecting mankind to the governmental system and power of one of the existing states. But the establishment of any type of world state, by whatever procedure arrived at, will require the use of some kind of political power, which may be that of one of the strongest states, or that of a world-wide political group capable of in-

fluencing the policy of various states, or which may be derived from a combination of these factors. Only the progressive ideal of an unpolitical global community, an ideal which is hardly compatible with the world-state concept as such, can explain the belief that a certain procedure, an international agreement implying surrender of sovereignty, will in itself solve the world-state problem in a generally and definitely satisfactory manner. If the world state is to be established by agreement among states, then this agreement will require preparation by political activity aiming at the creation and maintenance of concrete political conditions.

The creation of a world state is a concrete political problem which can be solved only by political action. Such action will have to be determined by a concrete political concept, and will have to be based on a careful choice of the methods most likely to bring about its realization. If the purpose of the creation of a universal government is the avoidance of another World War, then it evidently will be necessary to study the question as to whether, under the existing circumstances, the goal can be reached without involving mankind in a general struggle in which it may be exposed to the use of the same destructive weapons which seem to make the preservation of peace imperative.

At any rate, it will be possible to discuss the question of desirability and feasibility only with regard to a concrete type of world state and from a definite political viewpoint. Speaking simply of *the* world state or of the world state created by agreement, one can assert neither that it is a guarantee of universal peace, law, and liberty nor that it is an instrument of oppression. It will depend on the particular type of world state and on the concrete conditions under which it comes into existence how that state is to be organized, what powers the central government is to exercise, what authority is to be left to subordinate groups, and how these groups are to be composed. In order to fulfill its task of preserving universal peace, any world government of course would have to be effective, so that internal struggles could not arise which might assume the proportions of international wars. Supporters of some particular type of world state will have

to consider not only whether such a state can be established but also whether it will be possible firmly to maintain that particular regime. For instance, if the world state could be created by the forces which support within separate states regimes based on liberal-democratic principles, the risk would still have to be borne in mind that these forces may, in a global organization, become incapable of maintaining a similar regime of world-wide scope. By using its political strength, a state may be able to impose unity on the world, but in this case it may become difficult in the long run to maintain the distinct character of that state and to prevent its being swallowed by the masses of other peoples over which it intended to rule.

The present study is not concerned with political problems as such; it is, therefore, impossible to enter into a discussion of all the problems which may arise in connection with various types of world government, and of their desirability and feasibility. The fact which it is important here to emphasize is that the problem of transforming the world as it is today into a universal state is a political problem which can be solved only by political methods. The goal of this transformation is the elimination of the unrestricted operation of political forces, which results in international wars, and to subject political activities to the same kind of control to which they are subjected within national communities. Because of this different goal, a policy designed to bring about that transformation must be different from a policy which is based on the idea that the division of the world into states will be and should be maintained. But so long as there exists no world government, political activity, whether or not directed toward the creation of a global state, necessarily will have the same character—that is, the character of politics in a world divided into several states.

While many advocates of world government conceive of such a government in a manner which clearly reveals the influence of the progressive pattern of thought, the fact that they regard a world state as an indispensable condition of peace at the same time shows that the pattern of thought which seemed to support the League of Nations idea and to exclude the world state as an

ideal solution is no longer intact. It is true that, already in the period between the two World Wars, Scelle had spoken of the *world state as the logical result of the development leading to the firm establishment of the rule of law in the global sphere*. It is also true that the thinking of those persons who now advocate the establishment of the world state is influenced by ideas similar to those in which Scelle's concept of world government was based. But this concept was primarily theoretical. What Scelle had in mind was rather the slow growth of a strengthened and more perfect League of Nations than the creation of a real world government, on the feasibility of which he was doubtful. The goal of the new movement in favor of world government is to set up as soon as possible such an organization by explicit agreement. The advocates of that procedure are convinced that, as long as this goal is not reached, peace and order in the world cannot be maintained in the same manner as in the national communities.

The fact that under present conditions the maintenance of peace is essentially a political problem is recognized even by many supporters of the United Nations. They may try to reconcile this fact with their belief in the steady progress of mankind by asserting that the United Nations organization is "not yet" strong enough to fulfill all the tasks assigned to it in its Charter. But they admit at any rate that neither now nor in the near future the ideal situation can be realized which is characterized by the peaceful existence of free peoples under the rule of a universal legal order having its basis in the natural community of interests and ultimately depending for its observance on generally accepted standards of reasonableness and good will. To progressive thinkers the road toward progress seems to be less clearly indicated than it had appeared after the first World War, and elements of the progressive concept are combined with ideas of a different nature.

When the progressive pattern of thought was fully developed, its adherents believed that political practices and the concepts on which they were based were remnants of the past which were bound to disappear. The elimination of politics from the international sphere seemed to be the goal toward which mankind was moving. But in the period between the two World Wars political

movements developed which, in theory and practice, implied an absolute negation of progressive hopes and ideas. Fascism, and particularly German National Socialism, denied those human qualities on the existence of which the progressive concept was based. They accordingly did not grant the individuals the liberty of thought and action which in the progressives' view was a condition and guarantee of the peaceful coexistence, in a universal legal community, of free and equal peoples united by reasonable, unpolitical, common interests. Fascists and National Socialists, who stressed the importance of politics with regard to all human interests and activities, not only rejected the idea that mankind was progressing toward general recognition of uniform standards of justice and reason. They even assumed that in politics moral convictions had no importance at all. The basest elements of human nature were regarded as the decisive factors in the political sphere. Political action was considered necessarily to imply the use of violence, or threat of violence, or deceit. The only purpose of such action seemed to be the acquisition and maintenance of power as such, irrespective of the manner in which it was acquired and of the use which was made of it.

Fascism and National Socialism were a reaction against the progressive way of thinking and inevitably reflected the concept against which they were reacting. Their idea of politics, especially of politics in the international sphere, indeed corresponded to the idea of power politics which progressive thinkers used to oppose to the concept of the universal rule of law. To the progressives who regarded the complete elimination of politics as a fundamental feature of the ideal situation, politics as such seemed to be essentially evil. According to this viewpoint, there was not a choice between good and bad policies, but political action, which was concerned with power, always was unreasonable and immoral. The totalitarians, recognizing the infeasibility of the progressive ideal, accepted the only alternative which seemed to be left when this ideal was abandoned. It then appears understandable that disillusioned progressives, without necessarily adhering to the totalitarian creed in its entirety, easily adopt the totalitarians' viewpoint regarding international politics. The pro-

gressive becomes disillusioned when he realizes that the reasonable character of man does not have the effect of uniting mankind in a peaceful community in which all normally intelligent and well-meaning members of the human race generally agree on questions of common interest as understood in the light of common reason. When the hope of establishing an international organization based on a natural and, therefore, evident harmony of interest disappears, disillusionment not infrequently leads to the assumption of a natural disharmony which radically separates the peoples of the world from one another and which seems to exclude the possibility of international understanding and of peaceful cooperation of states. War appears not only as a risk inherent in the division of the world into states, but it is regarded as the inevitable result of the existence of several states with conflicting interests, as an event toward which the states are driven by irresistible forces and which intelligent and responsible statesmanship cannot prevent. If the hope of escaping from this desperate situation through the elimination of politics is abandoned, there seems to be left only the possibility of accepting the rules of political action in the worst sense of the term. Political activity seems to be essentially bad, not only in the sense that the complex character of political problems often makes it difficult to distinguish between right or wrong, or that the necessity of adapting political conduct to concrete political conditions frequently makes the choice between possible courses of action appear as one between two evils rather than between good and evil. But political activity seems to be bad in the sense that in the political game there is no room for moral considerations at all and that the rules of that game exclude the moral responsibility of the persons participating in it. Such a viewpoint may properly be termed cynical by anyone who recognizes man's duty to act according to his conscience and sees in this duty an essential element of his human nature.

The mere refusal to believe in the feasibility of a scheme of the League of Nations or United Nations type, however, cannot be regarded as the expression of a cynical view of world affairs. Adherents of the progressive concept which has been analyzed

in this study always have represented these schemes as being the result of highest idealism. They were designed indeed to maintain peace and to prevent the suffering which another World War was bound to cause. But highest idealism is not equivalent to blindness with regard to the conditions required for the working of a certain plan, or with regard to the conditions of human life in general. In the concept here analyzed these conditions were disregarded, and the manner in which they were ignored revealed a state of mind which hardly can be considered wholly idealistic. As has been said repeatedly above, the element which mainly made the plans of world organization attractive was the opinion that peace and order could be guaranteed without any important change of existing conditions. The thinker who held this opinion expected that the increased reasonableness of mankind would guarantee the success of world organization. Since generally he regarded himself as reasonable enough, he hoped that the others would rise to his level of wisdom. His reasonableness was based on his satisfaction with his and his particular community's general situation; he, therefore, hoped that the others eventually would share his viewpoint and that then he would be able to enjoy peace and security under the same conditions which had prevailed before the organization was established. In order to bring about the ideal situation, it seemed sufficient by teaching and preaching to convince the others of the advantages which they would derive from its realization. It appeared possible, therefore, to avoid the material and moral risks which ordinarily result from the necessity of reaching political decisions and engaging in political activity designed to bring about concrete improvements of political and social conditions. Thus, it may be said that the idea that everything could be obtained for nothing was an important element of the pattern of thought which shaped the League of Nations and the United Nations idea.

NOTES

NOTES

INTRODUCTION

1. United Nations Charter, Preamble.
2. *Ibid.*
3. *Ibid.*
4. *Ibid.*
5. *Ibid.*, Article 2 (1).
6. See below, pp. 278 ff.

1: THE UNITY OF WESTERN CHRISTENDOM IN THE LATE MIDDLE AGES AND ITS DISAPPEARANCE

1. It is significant in this respect that Bartolus, the famous post-glossator of the fourteenth century, defined the extent of the Empire by referring to the body of those obeying the Roman Church. (Cecil N. S. Woolf, *Bartolus of Sassoferrato: His Position in the History of Medieval Political Thought*, pp. 27ff.) On the basis of Roman law, Bartolus considered the Emperor to be universal lord *de jure*; but he also recognized that within the Western world, *de facto*, the authority of the Emperor of his time was limited to certain territories. The only criterion of the extent of the theoretical, *de jure*, Empire Bartolus found in the adherence to the Church.

2. August C. Krey, "The International State of the Middle Ages: Some Reasons for Its Failure," *American Historical Review*, XXVIII (1923), 7. Krey refers to the time of Innocent III, who occupied the Roman see from 1198 to 1216.

3. *Ibid.* John N. Figgis (*Studies of Political Thought from Gerson to Grotius, 1414-1625*, 2d ed., p. 15) describes the power of the Popes as sovereignty in the Austinian sense.

4. Sir Robert W. Carlyle and Alexander J. Carlyle, *A History of Mediaeval Political Theory in the West*, II, 238ff., V, 152ff.

5. *Ibid.*, II, 204ff.

6. See *ibid.*, V, 175ff., on the Albigensian Crusade at the beginning of the thirteenth century, the first instance of the latter type.

7. *Ibid.*, V, 440.

8. Michael Zimmermann, "La Crise de l'organisation internationale à la fin du moyen âge," *Académie de Droit International, Recueil des cours*, XLIV (1933-II), 355.

9. Arnold J. Toynbee, *A Study of History*, IV, 523.

10. Carlyle, *op. cit.*, V, 173ff.; see also Zimmermann, *op. cit.*, pp. 364ff., on the role of the Popes with respect to treaties.

11. Carlyle, *op. cit.*, V, 165. The question as to whether or not the Popes were organs of obligatory arbitration is not of particular importance in this connection. On this question see Zimmermann, *op. cit.*, pp. 374ff.

12. Zimmermann, *op. cit.*, pp. 383ff. See also Carlyle, *op. cit.*, IV, 362.

13. See Charles H. McIlwain, *The Growth of Political Thought in the West, from the Greeks to the End of the Middle Ages*, p. 312, on the general acceptance before the first quarter of the fourteenth century of the principle according to which the spiritual power was higher than the temporal.

14. The Church's authority in matters involving an oath, which included the power to declare an oath null and void and to control the observance of agreements confirmed by oath, was of particular importance in the feudal society of the Middle Ages.

15. See Figgis, *op. cit.*, p. 132: "the whole development of medieval Catholicism, with its legalistic conceptions of penance, and its legal system of the canon law, served to implicate with juristic notions the principles both of politics and ethics." In an earlier passage of his book (p. 13) the same author points out that in the Middle Ages religion was conceived under the form of legality. See also McIlwain, *op. cit.*, p. 225.

16. Félix Senn, *De la justice et du droit; explication de la définition traditionnelle de la justice, suivie d'une étude sur la distinction du ius naturale et du ius gentium*.

17. See Carlyle, *op. cit.*, II, 98ff.

18. *Ibid.*, p. 108. Gregory's successor, Innocent IV (1243-1254), claimed jurisdiction even over infidels in case of violation of the law of nature. See *ibid.*, V, 323, n. 2.

19. *Ibid.*, II, 165ff., 228ff.

20. Harold D. Hazeltine, *Encyclopedia of the Social Sciences*, s.v. "Canon Law."

21. Zimmermann, *op. cit.*, p. 321.

22. *Ibid.*, p. 374.

23. Henry of Cremona said in his pamphlet *De potestate Papae*: "Dicitur eciam, Papa numquam exercuit istam utramque potestatem seu juris dictionem. Sed hoc non fuit propter deesse potencie, sed propter dignitatem ejus, et vilitatem jurisdictionis temporalis" (Car-

lyle, *op. cit.*, V, 401, n. 1). On Alvarus Pelagius see McIlwain, *op. cit.*, p. 282. It may be interesting to quote a modern writer who explained the application of the principle of federation in the medieval Christian world as the result of a deliberate policy of the Popes: "They did not attempt to introduce an impracticable and uniform government from the centre, they admitted to the full the variety of local political organizations, but they tried to introduce harmony . . . into the life of those various bodies" (Sir Paul Vinogradoff, *Historical Types of International Law*, p. 38).

24. Zimmermann, *op. cit.*, p. 382. The French text reads: "Le trait le plus remarquable de l'organisation internationale du Moyen Age, c'est le droit de coercition du pape envers les agresseurs ou les perturbateurs de l'ordre établi. C'est un problème d'une gravité exceptionnelle, car deux principes idéologiques sont alors en lutte ouverte: la notion de la *ratio divina*, le sens moral des préceptes de l'Evangile et la nécessité juridique immanente à chaque ordre positif de faire respecter ses décisions. Le droit naturel est alors en opposition avec les préceptes du droit positif et un antagonisme théorique conduit finalement à une crise suprême du système hiéocratique."

25. Thomas Alfred Walker, *A History of the Law of Nations*, I, 93-94.

26. Reginald L. Poole, *Illustrations of the History of Medieval Thought and Learning*, 2d rev. ed., p. 201.

27. *Op. cit.*, IV, 538.

28. *Ibid.*, p. 215, n. 1.

29. See, for instance, Carl von Kaltenborn und Stachau, *Die Vorläufer des Hugo Grotius auf dem Gebiete des Ius naturale et gentium sowie der Politik im Reformationszeitalter*, pp. 49-50.

30. See, for instance, Hugo Grotius *De jure belli ac pacis libri tres* II. xxii. 13.1 (p. 552 of Kelsey translation [see Bibliography]): "The advantages which it [a world empire] brings are in fact offset by its disadvantages. For as a ship may attain to such a size that it cannot be steered, so also the number of inhabitants and the distance between places may be so great as not to tolerate a single government."

31. Figgis, *op. cit.*, pp. 161ff.

32. *Ibid.* In this passage Figgis speaks of canon as well as of Roman law and he adds that "all this helped the assimilation of legal, ethical and theological ideas, out of which grew both modern politics and international law."

33. In his analysis of the theories of Bartolus, C. N. S. Woolf explains that the rules of the Corpus Juris were regarded by their post-glossator as governing the relations between certain communities which in fact did not recognize the Emperor as superior, although they were considered to belong to the Empire. Woolf summarizes

this situation in the following statement: "When the Emperor was no longer recognised as superior, his place was taken by Law" (*op. cit.*, p. 198).

34. Alberico Gentili *De iuri belli libri tres* 1. iii (pp. 15ff., esp. p. 17, of Rolfe translation [see Bibliography]).

35. *Ibid.*

2: GROTIUS' THEORY OF THE LEGAL COMMUNITY OF MANKIND WITHOUT A CENTRAL ORGAN

1. For the edition and translation of that work used in this study, see Bibliography.

2. *Ibid.*, Prolegomena 1 (p. 9 of translation).

3. According to James Brown Scott (*The Spanish Origin of International Law*, Vol. I: *Francisco de Vitoria and His Law of Nations*, p. 3), Grotius' treatise was "the culmination of the Spanish school."

4. 1480(?)—1546.

5. Francisco de Vitoria, *De Indis noviter inventis*, tr. by J. P. Batc, in Scott, *op. cit.*, Appendix A.

6. Francisco de Vitoria, *De potestate ecclesiae*, tr. by G. L. Williams, in Scott, *op. cit.*, Appendix D. The contention that the Emperor is lord of the world was refuted by Vitoria as not founded in either natural, divine, or human law.

7. "In ordine ad spiritualia, i.e., quantum necesse est ad administrationem rerum spiritualium."

8. *Op. cit.*, II. xxii. 14 (p. 553 of translation). Grotius' view on the rule of the medieval Church as a political factor is evidenced by a passage in the Prolegomena (*ibid.*, Prolegomena 51 [pp. 27ff. of translation]). Grotius discusses there the literary sources used by him and mentions in this connection those writers who "have been distinguished among Christians for their piety and learning." With respect to them he says: "Their authority is the greater . . . as we approach nearer to the times of pristine purity, when neither desire for domination, nor any conspiracy of interests had as yet been able to corrupt the primitive truth" ("cum nec dominatus adhuc nec coitio ulla primitivam veritatem adulterare potuit"). References to the conditions of the primitive Church were frequently made in the Middle Ages by those who were opposed to the papacy's interference in political matters.

9. Grotius considers all Christians to be members of one body; according to him, the peoples belonging to this body should enter an alliance against the enemies of Christianity. *Ibid.*, II. xv. 12. Christian

states should also hold conferences for the settlement of disputes arising between some of them. *Ibid.*, II. xxiii. 7 (p. 560 of translation).

10. *Ibid.*, II. xii. 13 (p. 551 of translation).

11. *Ibid.*, I. i. 10 (pp. 38f. of translation).

12. *Ibid.*, Prolegomena 6ff. (pp. 11ff. of translation).

13. *Ibid.*, Prolegomena 28 (p. 20 of translation). The *De jure belli ac pacis* was published during the Thirty Years War.

14. *Ibid.*, I. ii (pp. 51ff. of translation).

15. *Ibid.*, I. ii. 1. 5 (p. 53 of translation).

16. *Ibid.*, II. i. 2. 1 (p. 171 of translation).

17. *Ibid.*, Prolegomena 25 (p. 18 of translation). In the same passage Grotius says: "But in order that wars may be justified, they must be carried on with not less scrupulousness than judicial processes are wont to be."

18. *Ibid.*, II. i. 2. 1 (p. 171 of translation).

19. Grotius states that "law, even though without a sanction, is not entirely void of effect" (*ibid.*, Prolegomena 20 [p. 16 of translation]). But to understand this statement it must be borne in mind that in the global community there is no sanction guaranteeing the observance of the rules concerning war as a method of law enforcement. This fact does not affect, however, the role of war as a legal sanction.

20. *Ibid.*, I. v. 1 (p. 164 of translation).

21. *Ibid.*, II. xxv. 1. 1 (p. 578 of translation).

22. *Ibid.*, I. v. 2. 1 (p. 164 of translation).

23. *Ibid.*, II. xxv. 6 (p. 582 of translation).

24. *Ibid.*, II. xxv. 4 (p. 581 of translation) and 9. 1 (p. 585 of translation).

25. *Ibid.*, III. xvii. 3 (pp. 786ff. of translation).

26. According to Grotius, the rule of impartiality applies only in cases when it is doubtful which party is engaged in a just war.

27. "Truly it is more honourable to avenge the wrongs of others rather than one's own, in the degree that in the case of one's own wrongs it is more to be feared that through a sense of personal suffering one may exceed the proper limit or at least prejudice his mind" (*ibid.*, II. xx. 40. 1 [pp. 504ff. of translation]).

28. *Ibid.*

29. *Ibid.*, II. xx. 44. 1 (p. 508 of translation). See also Prolegomena 24, where Grotius quotes an authority to the effect that "kings who measure up to the rule of wisdom make account not only of the nation which has been committed to them, but of the whole human race."

30. *Ibid.*, II. xxv. 8 (p. 583 of translation).

31. *Ibid.*, I. ix (pp. 138ff. of translation).

32. *Ibid.*, I. iv. 8ff. (pp. 156ff. of translation).

33. *Ibid.*, I. i. 10 (p. 38 of translation), I. i. 13 (p. 44 of translation).

34. *Ibid.*, Prolegomena 15 (p. 14 of translation): "it was necessary that among men there be some method of obligating themselves one to another, and no other natural method can be imagined."

35. *Ibid.* "For those who had associated themselves with some group, or had subjected themselves to a man or to men, had either expressly promised, or from the nature of the transaction must be understood impliedly to have promised, that they would conform to that which should have been determined, in the one case by the majority, in the other by those upon whom authority had been conferred."

36. *Ibid.*, Prolegomena 16 (p. 15 of translation).

37. *Ibid.*, II. ii. 5 (p. 192 of translation). Grotius declares that "municipal law cannot enjoin anything which the law of nature forbids, or forbid what the law of nature enjoins," although it can forbid what by the law of nature was permitted.

38. *Ibid.*, II. xxvi (pp. 587ff. of translation). It has been mentioned above that, according to Grotius, a subject should not carry out an order that is contrary to the law of nature.

39. *Ibid.*, I. iii. 1 (pp. 91ff. of translation); see also I. i. 2 (p. 33 of translation).

40. *Ibid.*, I. iii. 2. 1 (p. 92 of translation).

41. *Ibid.*, I. iv (pp. 138ff. of translation).

42. The concept of war waged for just causes is based on medieval theory. But after the close of the Middle Ages the medieval *bellum justum* theory subsisted "in a changed environment" (Luigi Sturzo, *The International Community and the Right of War*, p. 180). In the medieval theory of *bellum justum* it had been doubtful which authority was entitled to undertake a war. The answer to this question varied with different appreciations of the political and legal situation, which was determined mainly by the feudal structure of medieval society and the imperial and papal claims to rulership over the Christian world. "In those days, then, the problem of the legitimate authority for declaring war coincided with the problem of the political-ecclesiastical and feudal organization of the time, and the conception of a unification of Christendom. . . . The concept, therefore, of this competent authority discriminates not merely between public and private war but between the religious positions of the faithful and infidels, between the grades of the feudal hierarchy, between vassals and overlords, and between the highest world authorities, the Emperor and the Pope" (*ibid.*, p. 176). For Grotius the question as to the lawful authority to undertake international war was practically

settled. The rulers of the various territorial states were the only authorities to be considered in this connection, and they appeared as the guardians of law and order in the global community.

The political changes, reflected in this theoretical development, affected also the conditions which, in the Middle Ages, had given some specific significance to the judgment on the causes of war of certain individuals and bodies, conditions which were quite different from those under which Grotius discussed the question as to how a subject ought to behave in the case of a war unjustly undertaken by his superior. "In the Middle Ages the estimation of the justice of a war was not merely reserved to the Sovereign, but was vested in all the various orders of society. Vassals, in virtue of their semi-autonomous position, and Free Cities, Guilds, Universities, Churches, Monasteries, in virtue of their immunities, might judge a war unjust or inopportune, and, even in the heart of the warring kingdom, remain aloof of it. In the regime of absolute States this instinctive and autonomous participation in appreciating a war disappeared. . . . Little by little such appreciation became the exclusive attribution of the Sovereign" (*ibid.*, p. 180).

43. Grotius, *op. cit.*, Prolegomena 39 (p. 23 of translation).

44. *Ibid.*, I. i. 12. 1 (p. 42 of translation).

45. *Ibid.*, Prolegomena 40 (p. 24 of translation).

46. *Ibid.*, Prolegomena 46ff. (pp. 26ff. of translation).

47. *Ibid.*

48. *Ibid.*

49. *Ibid.*, Prolegomena 58 (pp. 29f. of translation): "If any one thinks that I have had in view any controversies of our own times, either those that have arisen or those which can be foreseen as likely to arise, he will do me an injustice. With all truthfulness I aver that, just as mathematicians treat their figures as abstracted from bodies, so in treating law I have withdrawn my mind from every particular fact."

50. *Ibid.*, II. i. 18. 1 (p. 185 of translation): "Not less unacceptable is the doctrine of those who hold that defence is justifiable on the part of those who have deserved that war be made upon them; the reason they allege is, that few are satisfied with exacting vengeance in proportion to the injury suffered. But fear of an uncertainty cannot confer the right to resort to force; hence a man charged with a crime, because he fears that his punishment may be greater than he deserves, does not, on that account, have the right to resist by force the representatives of public authority who desire to take him."

51. *Ibid.*, III. vi. 1 (pp. 663ff. of translation).

52. *Ibid.*, III. xv (p. 770 of translation).

53. *Ibid.*, II. xxiii. 1 (p. 557 of translation).

54. *Ibid.*, III. iv. 4 (p. 644 of translation).

55. *Ibid.*, III. iii (pp. 630ff. of translation). According to Grotius, the law of nature requires a declaration of war only in certain cases (III. iii. 6 [pp. 634ff. of translation]).

56. *Ibid.*, III. iv. 3 (pp. 643ff. of translation).

57. *Ibid.*, III. vi. 2. 1 (p. 664 of translation).

58. *Ibid.*, III. viii (pp. 697ff. of translation).

59. *Ibid.*, III. xix. 11 (pp. 798ff. of translation).

60. *Ibid.*, III. x. 5 (pp. 719ff. of translation).

61. *Ibid.*, III. xiii. 1. 2 (p. 757 of translation).

62. *Ibid.*, I. i. 14 (p. 44 of translation).

63. *Ibid.*, III. iii. 12 (p. 639 of translation).

64. *Ibid.*, Prolegomena 40 (pp. 23ff. of translation).

65. *Ibid.*, III. ix. 19. 1 (pp. 714ff. of translation).

66. *Ibid.*, I. i. 14. 1 (p. 44 of translation).

67. *Ibid.*, Prolegomena 17 (p. 15 of translation): "But just as the laws of each state have in view the advantage of that state, so by mutual consent it has become possible that certain laws should originate as between all states, or a great many states; and it is apparent that the laws thus originating had in view the advantage, not of particular states, but of the great society of states. And this is what is called the law of nations, whenever we distinguish that term from the law of nature."

68. *Ibid.*, II. xx. 44. 6 (p. 510 of translation).

69. *Ibid.*

70. *Ibid.*, I. i. 14. 1 (p. 44 of translation).

71. *Ibid.*, III. x. 3 (p. 719 of translation).

72. *Ibid.*

73. Jan Kosters, *Les Fondements du droit des gens; contribution à la théorie générale du droit des gens*, pp. 53ff.

74. Grotius, *op. cit.*, Prolegomena 30 (p. 21 of translation): "For the principles of the law of nature, since they are always the same, can easily be brought into a systematic form; but the elements of positive law, since they often undergo change and are different in different places, are outside the domain of systematic treatment, just as other notions of particular things are."

75. *Ibid.*, II. xxiv (pp. 567ff. of translation).

76. *Ibid.*, II. xxiv. 7 (p. 574 of translation).

77. *Ibid.*, II. xxv (pp. 583ff. of translation).

3: PUFENDORF'S CONCEPT OF FREE AND
EQUAL STATES COEXISTING IN A STATE
OF NATURE AND WOLFF'S DOCTRINE
OF A FICTITIOUS WORLD STATE

1. This author (1632–1694) dealt with the problems here under consideration in three books: *Elementorum jurisprudentiae universalis libri duo* (first published 1660), *De jure naturae et gentium libri octo* (first published 1672), and *De officio hominis et civis juxta legem naturalem libri duo* (first published 1673). The second of these is the most comprehensive and important. For the editions and translations used in this study, see Bibliography.

2. *De jure naturae et gentium* II. III. 20 (p. 217 of translation).

3. *Ibid.*, II. III. 14 (p. 205 of translation).

4. *Ibid.*, II. III. 23 (p. 226 of translation).

5. *Ibid.* (p. 228 of translation). Pufendorf declared that insofar as the rules of the law of nations were supposed to be customary rules based on a tacit agreement, anyone could free himself from the obligation to observe them simply by declaring expressly that he did not want to be bound by them and did not expect their observance by others.

6. *Elementa jurisprudentiae universalis* I. Def. XIII. 25 (p. 165 of translation): "And, assuredly, if some special law ought to be set up on the basis of the common usage of nations, the very first heading in it will treat of the legitimate waging of wars for mere ambition, or with the prospect of making gain, than which nothing is more frequent among most nations."

7. *De jure naturae et gentium* III. IV. 1 (p. 380 of translation).

8. *Ibid.*, I. VII. 7 (p. 118 of translation). See also III. I. 2 (p. 314 of translation).

9. *Ibid.*, II. III. 23 (pp. 227ff. of translation).

10. *Ibid.*, II. II. 4 (p. 162 of translation).

11. Edwin D. Dickinson, *The Equality of States in International Law*, pp. 47ff.

12. *De jure naturae et gentium* II. II–III (pp. 145ff. and 179ff. of translation).

13. *Elementa jurisprudentiae universalis* I. Def. IV. 1 (p. 18 of translation); *De jure naturae et gentium* I. I. 12 (p. 11 of translation).

14. *De jure naturae et gentium* VII. II. 13 (p. 983 of translation).

15. *Ibid.*, II. III. 11 (p. 199 of translation): "All civil laws, indeed, presuppose or incorporate the general principles at least of natural law, whereby the safety of the human race is maintained; and these latter are by no means done away with by the former, which are

merely added to them as the distinct advantage of each state has required."

16. *Ibid.*, VIII. i. 2 (p. 1133 of translation). On the relation of municipal law to natural law, see *ibid.*, II. iii. 1-3 (pp. 179ff. of translation).

17. *Ibid.*, II. ii. 3 (p. 159 of translation); *De officio hominis et civis* II. i. 8 (p. 90 of translation).

18. *De jure naturae et gentium* III. ii. 1-2 (pp. 330ff. of translation).

19. *Ibid.*, III. ii. 9: "Aequalitas potestatis seu libertatis."

20. *Ibid.*, VIII. iv. 18 (p. 1253 of translation).

21. On the absence in Grotius' theory of the concept of state equality, see Dickinson, *op. cit.*, pp. 34ff., 51ff.

22. *De jure naturae et gentium* II. i. 8 (pp. 152ff. of translation).

23. *Ibid.*, II. iii. 14 (p. 205 of translation).

24. *Ibid.*, II. iii. 15 (pp. 207ff. of translation).

25. *Ibid.*, II. iii. 10 (p. 194 of translation).

26. *Ibid.*, II. iii. 14 (p. 207 of translation).

27. *Ibid.*, II. iii. 10 (p. 195 of translation).

28. In the first of the three books in which Pufendorf deals with the subject here under consideration (*Elementa jurisprudentiae universalis* II. Obs. iv. 4 [p. 242 of translation]), he lays down the fundamental laws of nature "from which all the rest flow" in a manner which reveals very clearly the characteristic features of his concept. There are two fundamental laws: "(1) *That any one whatsoever should protect his own life and limbs, as far as he can, and save himself and what is his own.* (2) *That he should not disturb human society, or, in other words, that he should not do anything whereby society among men may be less tranquil.* These laws ought so to conspire, and, as it were, be intertwined with one another, as to coalesce, as it were, into one law, namely, *That each should be zealous so to preserve himself, that society among men be not disturbed.*"

29. *De jure naturae et gentium* II. ii. 5-9 (pp. 165ff. of translation).

30. *Ibid.*, v. xiii. 2 (p. 826 of translation).

31. *Ibid.*, VIII. vi. 3 (p. 1294 of translation).

32. *Ibid.*, VIII. iii. 7 (p. 1171 of translation).

33. *Ibid.*, VIII. vi. 14 (pp. 1305ff. of translation).

34. *Ibid.* (p. 1307 of translation).

35. *Ibid.*

36. *Ibid.*, v. xiii. 3 (p. 826 of translation).

37. *De officio hominis et civis* II. i. 10 (p. 91 of translation). In the *Elementa jurisprudentiae universalis* Pufendorf declares that "to attack some one in warfare on account of a case not yet ascertained [by arbitrators], amounts to pronouncing in one's own case, a thing

which nature allows only for manifest injury" (II. Obs. iv. 31 [p. 267 of translation]).

38. *De jure naturae et gentium* VIII. vi. 4 (p. 1295 of translation).

39. Hugo Grotius *De jure belli ac pacis libri tres* II. xxiii. 7-9 (pp. 560ff. of Kelsey translation [see Bibliography]).

40. v. xiii (pp. 825ff. of translation).

41. The arbitrator is supposed to decide the case according to strict natural law, unless provision is made for a different basis of decision. *De jure naturae et gentium* v. xiii. 5 (p. 829 of translation).

42. *Ibid.*, v. xiii. 7 (p. 830 of translation).

43. *Ibid.*, II. ii. 11 (pp. 175ff. of translation). Pufendorf declares that if among some nations complete disregard for the rules of natural law was customary, "a universal agreement, whereby all would agree to maintain the law of nature, would be necessary to restore peace" (*ibid.*). "But in general civilized men should almost be ashamed to be a party to a pact the articles of which say no more than that they may not clearly and directly violate the law of nature, as if without such a pact a man would not be sufficiently mindful of his duty" (*ibid.*, VIII. ix. 2 [p. 1330 of translation]).

44. In the *Elementa jurisprudentiae universalis*, Pufendorf says that it is useless to fortify peace by a pact or by treaties "unless the parties to the agreement come together in one body or society" (I. Def. iii. 5 [p. 11 of translation]).

45. *De jure naturae et gentium* II. iii. 12 (p. 176 of translation).

46. *Ibid.*, VII. i. 10 (p. 964 of translation).

47. *Ibid.*, VII. i. 9 (p. 963 of translation).

48. *Ibid.*, VII. i. 8 (pp. 962ff. of translation).

49. *Ibid.*, VIII. i. 2 (p. 1133 of translation).

50. *Ibid.*, II. ii. 4 (p. 164 of translation). See also VII. i. 4 (p. 953 of translation).

51. *Elementa jurisprudentiae universalis* II. Obs. v. 1 (p. 274 of translation). Pufendorf here declares that "the numbers of the human race and the infinite multitude of transactions have not allowed men to unite into one body." Such a body, according to him, would be subject to internal disturbances which would expose the human race to the same or even greater dangers than those which threaten its security in a world divided into states.

52. *De jure naturae et gentium* II. ii. 4 (p. 163 of translation).

53. *Ibid.* (p. 164 of translation).

54. *Ibid.*

55. 1679-1754. The following analysis is based on Wolff's *Jus gentium methodo scientifica pertractatum*. For the edition and translation used in this study, see Bibliography.

56. *Ibid.*, Prolegomena 2, 16 (pp. 9 and 15 of translation).

57. *Ibid.*, 3 (p. 9 of translation).

58. *Ibid.*, 7 (p. 11 of translation): "If we should consider that great society, which nature herself has established among men, to be done away with by the particular societies, which men enter, when they unite into a state, states would be established contrary to the law of nature, in as much as the universal obligation of all toward all would be terminated; which assuredly is absurd."

59. Before the *Jus gentium* Wolff had published a comprehensive treatise on natural law—*Jus naturae methodo scientifica pertractatum* (1740–1747).

60. *Jus gentium*, Preface (p. 6 of translation): "civil laws are not matters of mere caprice, but the law of nature itself prescribes the method by which the civil law is to be fashioned out of natural law, so that there can be nothing which can be criticized in it."

61. *Ibid.*, Prolegomena 4 (p. 10 of translation).

62. *Ibid.*, Prolegomena 3 (p. 9 of translation): "For example, man is bound to preserve himself by nature, every nation by the agreement through which it is made a definite moral person. But there is one method of preservation required for a man, another for a nation."

63. *Ibid.*, ii. 255ff. (p. 130 of translation) and ii. 269 (p. 137 of translation).

64. *Ibid.*, ii. 258 (p. 132 of translation).

65. *Ibid.*, Prolegomena 7–8 (p. 11 of translation).

66. *Ibid.*, i. 27 (p. 30 of translation). Wolff deals in the first chapter of his treatise with the duties of states to themselves and the rights arising therefrom. Only in the next chapter does he discuss the duties of states to each other and the corresponding rights.

67. *Ibid.*, i. 28 (p. 20 of translation).

68. *Ibid.*, i. 29 (p. 20 of translation).

69. *Ibid.*, ii. 180 (p. 94 of translation).

70. *Ibid.*, ii. 156 (p. 84 of translation).

71. *Ibid.*, ii. 166 (p. 88 of translation).

72. *Ibid.*, ii. 156 (p. 84 of translation).

73. *Ibid.*, ii. 206 (p. 107 of translation). Wolff declares that "this general principle has great utility in the law of nations, since it helps in the decision of many questions, which, if it were not considered, would seem beset with great difficulties."

74. *Ibid.*, ii. 157 (p. 85 of translation).

75. *Ibid.*, ii. 159 (p. 85 of translation).

76. *Ibid.*

77. *Ibid.*, ii. 187 (p. 97 of translation).

78. *Ibid.*, ii. 188–191 (pp. 98ff. of translation). See also i. 73–77 (pp. 43ff. of translation).

79. *Ibid.*, vi. 617–619 (pp. 314ff. of translation). Wolff rejects

Grotius' idea that a state can punish a nation which violates the law without injuring another nation. *Ibid.*, vi. 637 (p. 327 of translation). When he speaks of punitive war, he means a war by which a state attempts to obtain satisfaction from another state for an injury which it has suffered from that state. *Ibid.*, ii. 272; v. 580; vi. 636 (pp. 139, 296, 325 of translation).

80. *Ibid.*, v. 562 (p. 288 of translation).

81. *Ibid.*, v. 569 (p. 290 of translation).

82. *Ibid.*, vi. 632 (p. 323 of translation).

83. *Ibid.*, v. 571 (p. 291 of translation).

84. *Ibid.*, vi. 633 (p. 324 of translation).

85. *Ibid.*, vi. 632 (p. 323 of translation).

86. *Ibid.*, v. 570 (p. 290 of translation).

87. *Ibid.*, v. 571 (p. 291 of translation).

88. *Ibid.*, vi. 632 (p. 323 of translation).

89. *Ibid.*

90. *Ibid.*, v. 572 (p. 292 of translation).

91. In a clear case, according to Wolff, a state can go to war against another if it cannot obtain what is due it by means other than war, such as reprisals or androlepsy. *Ibid.*, vi. 630 (p. 321 of translation).

92. *Ibid.*, v. 572; vi. 631 (pp. 292, 322 of translation).

93. *Ibid.*, vi. 627, 652; viii. 965-966 (pp. 319, 336, 488-89 of translation).

94. *Ibid.*, Prolegomena 9 (p. 12 of translation).

95. *Ibid.*, Prolegomena 13 (p. 14 of translation).

96. *Ibid.*, viii. 965 (p. 488 of translation).

97. *Ibid.*, vi. 652 (p. 336 of translation).

98. *Ibid.*, vi. 642ff. (pp. 330ff. of translation).

99. *Ibid.*, vi. 642 (p. 330 of translation).

100. *Ibid.*, vi. 643 (p. 330 of translation).

101. *Ibid.*

102. *Ibid.*, vi. 644 (p. 331 of translation).

103. *Ibid.*, viii. 968 (p. 490 of translation).

104. *Ibid.*, vi. 650-651 (pp. 334ff. of translation).

105. *Ibid.*, vi. 643 (p. 330 of translation).

106. *Ibid.*, vi. 649 (p. 334 of translation).

107. *Ibid.*, vi. 643 (p. 330 of translation).

108. Grotius, *op. cit.*, i. ii. 8 (pp. 78ff. of translation).

109. *Jus Gentium* vi. 636 (p. 325 of translation).

110. "Nothing is more opposed to the nature of men than is war, for which the law of nature allows place only as a means of defence, as for an unavoidable evil. But war has its beginning in the injustice of those who are unwilling to allow to others their right or in their

unfairness, in that they avoid the milder remedies by which in a doubtful case the controversy can be settled, or finally in their wickedness, in that they do not shrink from injuring others. If then injustice, unfairness and wickedness were hated words, all war would be banished from the earth, and all nations and all individual men would enjoy perpetual peace" (*ibid.*, viii. 961 [p. 487 of translation]). See also: "If good faith were as sacred to nations as it ought to be, and if it were not for the fact that they prefer to be ruled by their impulses rather than by their reason, or if their honour, which they ought to cherish, restrained them from being compelled only unwillingly to agree to that to which they did not wish to agree, their controversies could be settled as the law of nature prescribes, nor would there be need of settling them by force of arms" (*ibid.*, v. 574 [p. 294 of translation]).

111. *Ibid.*, iii. 287-288 (p. 146 of translation). See also ii. 177 (p. 92 of translation): "But if it could be brought about that all nations in general . . . would strive with all their might satisfactorily to perform their duties, there would be abundant provision for the welfare of all nations."

112. *Ibid.*, Prolegomena 4 (p. 10 of translation).

113. *Ibid.*, Preface (p. 5 of translation).

114. *Ibid.*, Prolegomena 12 (p. 13 of translation).

115. *Ibid.* (p. 14 of translation). The existence of positive law does not eliminate the obligatory character of the law of nature; it "constantly retains its force, so that we should do right, and should not wish to do the things which can be done without punishment, unless they may also be done rightly" (*ibid.*, Preface [p. 7 of translation]).

116. *Ibid.*, vii. 888 (p. 454 of translation).

117. *Ibid.*, vii. 689 (p. 455 of translation).

118. *Ibid.*, v. 574 (p. 293 of translation).

119. *Ibid.*, Prolegomena 9 (p. 12 of translation).

120. *Ibid.*, Prolegomena 22 (p. 17 of translation).

121. *Ibid.*, Prolegomena 21 (p. 17 of translation).

122. *Ibid.*, Prolegomena 19 (p. 16 of translation).

123. *Ibid.*, Prolegomena 20 (p. 16 of translation).

124. *Ibid.*

125. *Ibid.*, Prolegomena 21 (p. 17 of translation).

126. The identity of the law of nations (necessary and volitional) with the science of that law is clearly expressed in the first words of the opening sentence of Wolff's treatise: "By the law of nations we understand the science of that law which. . . ."

127. *Ibid.*, Prolegomena (p. 17 of translation).

128. *Ibid.*, Prolegomena (p. 17 of translation).

129. *Ibid.*, Prolegomena (p. 18 of translation).
 130. *Ibid.*, Preface (p. 8 of translation).
 131. *Ibid.*, iv. 407 (p. 214 of translation).
 132. *Ibid.*, iv. 409 (p. 215 of translation).
 133. *Ibid.*, iv. 407-408 (pp. 213ff. of translation).
 134. *Ibid.*, v. 572 (p. 292 of translation): "although the customs of nations make customary law, nevertheless we do not recognize as true law that which is observed as customary law among nations, except in so far as it is in harmony with the natural theory of civil law, and therefore, as we have said, deserves a place in the voluntary law of nations. Just as a legislator cannot make an illegal thing legal by positive civil law, and ought to be on his guard lest certain errors prevailing generally may be taken for the law of nature, so that same thing is to be understood concerning the customary law of nations." In another passage (vii. 793 [p. 410 of translation]) Wolff compares bad custom to unjust positive law of a state.
 135. *Ibid.*, vii. 888 (p. 454 of translation).
 136. *Ibid.*, v. 574 (p. 293 of translation).
 137. *Ibid.*, ii. 177 (p. 92 of translation) and Preface (p. 8 of translation).
 138. *Ibid.*, v. 574 (p. 294 of translation).
 139. *Ibid.*, Prolegomena 19 (p. 16 of translation).
 140. *Ibid.*
 141. Emmerich de Vattel (1714-1767), who in general closely followed Wolff's ideas and through whom these ideas exercised considerable influence on the development of the science of international law, disagreed with Wolff with regard to the latter's concept of the supreme state. In his criticism of this concept Vattel expressed his opposition to a real world government. Since the supreme state as conceived of by Wolff was not a real world state, Vattel's arguments do not seem to conflict with Wolff's ideas. Vattel considers a world state to be unnecessary. "It is clear that there is by no means the same necessity for a civil society among Nations as among individuals. It can not be said, therefore, that nature recommends it to an equal degree, far less that it prescribes it. Individuals are so constituted that they could accomplish but little by themselves and could scarcely get on without the assistance of civil society and its law. But as soon as a sufficient number have united under a government, they are able to provide for most of their needs, and they find the help of other political societies not so necessary to them as the State itself is to individuals." Vattel, *Le Droit des gens*, Preface, p. 9a of Fenwick translation (see Bibliography).
- Moreover, in Vattel's opinion, states do not behave in the same way as individuals. "States are not like individuals in the conduct of their

affairs. Ordinarily their resolutions are not taken nor their public policy determined by the blind rashness or the whim of an individual. Advice is taken and more calmness and deliberation shown; and in delicate or important situations arrangements are made and agreements reached by means of treaties" (*ibid.*, p. 102 of translation). Finally, Vattel explains why a world state which would deprive the individual states of their independence would be not only unnecessary but even undesirable: "Independence is necessary to a State, if it is to fulfill properly its duties towards itself and its citizens and to govern itself in the manner best suited to it" (*ibid.*).

4: THE POSITIVIST THEORY OF INTERNATIONAL LAW AS LAW CREATED BY SOVEREIGN CIVILIZED STATES

1. Lassa F. L. Oppenheim, *International Law: a Treatise*, Vol. I: *Peace*; Vol. II: *War and Neutrality*.

2. *Ibid.*, I, 22 (§ 16).

3. *Ibid.*, I, 26 (§ 20). See I, 4 (§ 1): "As . . . there cannot be a sovereign authority above the several Sovereign States, the Law of Nations is a law *between*, not above, the several States, and is, therefore, since Bentham, also called 'International Law.'"

4. *Ibid.*, I, 109 (§ 64).

5. *Ibid.*, I, 9 (§ 6).

6. *Ibid.*, I, 367ff. (§§ 292ff.). Oppenheim here refers to several writers who maintain that international law guarantees to any individual at home and abroad such rights as "the right of existence, the right to protection of honour, life, health, liberty, and property, the right of practising any religion one likes, the right of emigration, and the like."

7. *Ibid.*, I, 26 (§ 20).

8. *Ibid.*, I, 4 (§ 1). See also I, 19, 362ff. (§§ 13, 288ff.).

9. *Ibid.*, I, 26 (§ 21).

10. *Ibid.*, I, 32 (§ 28).

11. *Ibid.*, I, 30 (§ 26).

12. *Ibid.*, I, 34, 155ff. (§§ 28, 103ff.). Oppenheim mentions as belonging to this last category Persia, Siam, China, Morocco, and Abyssinia. See also the list of "International Persons of the Present Day," I, 162ff. (§§ 108ff.).

13. *Ibid.*, I, 34 (§ 29).

14. According to this theory, civilized states are legally unrestricted in their policy of colonial expansion and of political and economic penetration with regard to peoples considered to be outside

the international community. It may be observed in this connection that the first action undertaken by a European power with a view to establishing a colonial empire, the Spanish conquest of American territories, was judged by Francisco de Vitoria according to the universal law applying equally to Spain and to the communities formed by the American aborigines.

15. *Ibid.*, I, 34 (§ 28).

16. *Ibid.*, I, 25 (§ 19).

17. *Ibid.*, I, 6 (§ 3).

18. *Ibid.*, I, 34 (§ 29).

19. *Ibid.*, II, 72 (§ 61).

20. *Ibid.*, II, 60 (§ 54).

21. *Ibid.*, II, 59ff. (§§ 53ff.).

22. *Ibid.*, II, 361 (§ 293).

23. *Ibid.*, I, 3 (§ 1).

24. Oppenheim obviously thinks that isolated agreements between states alone do not necessarily imply the existence of an international legal order. See *ibid.*, I, 540 (§ 491): "Even before a Law of Nations in the modern sense of the term was in existence, treaties used to be concluded between States. And although in those times treaties were neither based on nor were themselves a cause of an International Law, they were nevertheless considered sacred and binding on account of religious and moral sentiment."

25. *Ibid.*, I, 4 (§ 1).

26. *Ibid.*, I, 59 (§ 43).

27. *Ibid.*, I, 23 (§ 18).

28. *Ibid.*

29. *Ibid.*, I, 587 (§ 555).

30. First published in German as *Die Zukunft des Völkerrechts* (Leipzig, W. Engelmann, 1911).

31. *The Future of International Law*, p. 4 (§ 6).

32. See *International Law: a Treatise*, I, 588ff. (§§ 556ff.), for a list of lawmaking treaties of world-wide importance.

33. It is not necessary here to examine the concept of lawmaking treaties more closely. It may be sufficient to state that neither Oppenheim nor any other writer has ever succeeded in establishing an objective criterion for the distinction between agreements laying down rules of international law and other international agreements.

34. *Ibid.*, I, 550 (§ 506).

35. *Ibid.*, I, 24 (§ 18).

36. *Ibid.*

37. *Ibid.*, I, 16 (§ 11).

38. Oppenheim declares that in Great Britain Parliament has law-

making authority by virtue of customary law. All statute or written law in that country, therefore, is based on unwritten law. Ibid., I, 8 (§ 4).

39. *Ibid.*, I, 166 (§ 113).

40. *Ibid.*, I, 11 (§ 7).

41. *Ibid.*, I, 542 (§ 493).

42. *Ibid.*, I, 107 (§ 63).

43. *Ibid.*

44. *Ibid.*, I, 167 (§ 113).

45. *Ibid.*, I, 166 (§ 113).

46. *Ibid.*, I, 167 (§ 113). Oppenheim rejects the idea that the states have certain fundamental rights, such as "the right of existence, of self-preservation, of equality, of independence, of territorial supremacy, of holding and acquiring territory, of intercourse, and of good name and reputation" (*ibid.*, I, 165 [§ 112]). The opinion maintained by many writers, that these fundamental rights "are a matter of course and self-evident," evidently appears to Oppenheim to be unacceptable as an idea based on the natural-law concept. He moreover observes that "great confusion exists in this matter, and hardly two text-book writers agree in details with regard to it" (*ibid.*). His own theory of qualities constituting the international personality does not seem, however, to be essentially different from the concept of fundamental rights.

47. *Ibid.*, I, 20 (§ 15). See also I, 168 (§ 115): "The equality before International Law of all member-States of the Family of Nations is an invariable quality derived from their International Personality."

48. *Ibid.*, I, 168 (§ 114).

49. *Ibid.*, I, 188 (§ 134).

50. *Ibid.*, I, 185 (§ 130).

51. *Ibid.*, I, 168 (§ 114).

52. In his book, *The Future of International Law*, p. 10 (§ 15), Oppenheim says with regard to that character of the international society: "There are the rules which relate to the independence of each state of all other states, to the equality of all states, to their supremacy both personal and territorial, and to their responsibility; and in addition there are those rules which, exceptionally, allow, or at any rate excuse, certain inroads on the legal sphere of other states."

53. *International Law: a Treatise*, I, 8 (§ 5).

54. *Ibid.*, I, 13 (§ 9).

55. *Ibid.*, I, 396 (§ 319).

56. *Ibid.*, II, 326 (§ 265).

57. After having laid down the rule of nonintervention, Oppenheim discusses the exceptions to this rule. He carefully distinguishes

"interventions which take place by right" from others, merely admitted by international law, which allow the state concerned to resist the interference. *Ibid.*, I, 188ff. (§§ 134ff.). He finally arrives at the conclusion, however, that in any case "intervention is *de facto* a matter of policy just like war" (*ibid.*, I, 195 [§ 138]).

58. *Ibid.*, I, 573 (§ 539).

59. *Ibid.*

60. *Ibid.*

61. *Ibid.*, I, 23 (§ 17).

62. *Ibid.*, I, 170 (§ 116).

63. *Ibid.*, I, 171, n. 1 (§ 116).

64. *Ibid.*, I, 169 (§ 115).

65. *Ibid.*, I, 170 (§ 116).

66. *Ibid.*

67. *Ibid.*

68. *Ibid.*, I, 196 (§ 138).

69. *Ibid.*, I, 80 (§ 51).

70. *Ibid.*

71. *Ibid.*, I, 193, n. 1 (§ 136).

72. *Ibid.*

73. See, for instance, *ibid.*, I, 12 (§ 8): "the Family of Nations is still in the beginning of its development."

74. *Ibid.*, I, 13 (§ 9).

5: THE DOCTRINE OF UNIVERSAL REASON- ABLE STANDARDS OF GOVERNMENT

1. Published in 1690. For the edition used in this study, see Bibliography.

2. *Two Treatises of Government*, § 95.

3. *Ibid.*, § 6. According to Locke, property can be acquired by men living in the state of nature. *Ibid.*, §§ 25ff.

4. *Ibid.*, §§ 123ff.

5. *Ibid.*, § 131.

6. *Ibid.*, §§ 134ff.

7. *Ibid.*, § 142.

8. *Ibid.*, § 135.

9. *Ibid.*, § 13.

10. *Ibid.*, § 91.

11. *Ibid.*, § 90.

12. *Ibid.*, § 143. Locke mentions as the third of the "Powers of the Commonwealth" the federative power which "contains the power of war and peace, leagues and alliances, and all the transactions with

all persons and communities without the commonwealth" (*ibid.*, § 146). He does not attribute the exercise of the judicial function to a separate power.

13. *Ibid.*, § 143.

14. *Ibid.*, § 149.

15. *Ibid.*

16. *Ibid.*, §§ 202ff., §§ 211ff. Locke does not speak in this connection of rebellion of the people because he regards those as rebels who abuse governmental powers entrusted to them. *Ibid.*, § 227. But his theory is a justification of what is commonly called rebellion.

17. *Ibid.*, § 232.

18. At one particular moment of his life every man is supposed to be entirely free from the bonds of a state and to appear simply as a member of the human race. Locke assumes that the state is based not on hypothetical or implied but on actual consent, and that every individual is free to choose "what body politic he will unite himself to" when he reaches the age of discretion. *Ibid.*, § 118.

19. Like Pufendorf, Locke regarded the states as coexisting in the state of nature and their intercourse as governed by natural law. He obviously considered this situation to be unalterable. See *ibid.*, § 14: "since all princes and rulers of independent governments all through the world are in a state of nature, it is plain the world never was, nor ever will be, without numbers of men in that state."

20. It may be remembered in this connection that Grotius, while strictly limiting the right of an oppressed people to revolt against its ruler, considered a war waged against the latter by another ruler as permitted by natural law, even when the people itself had no right to resist. The international structure of the world here made it possible to conceive of a legal method of redressing the wrong done to a people which was not allowed to help itself because of its subjection to a state government.

21. Edward Gibbon, *The Decline and Fall of the Roman Empire*, Modern Library ed., pp. 72f.

22. Constitution of June 24, 1793, Article 120.

23. Lassa F. L. Oppenheim, *International Law: a Treatise*, I, 419 (§ 338).

24. *Ibid.*

25. When the English author, D. G. Ritchie, in a book published in 1894, presented a critical analysis of the natural-rights doctrine, he said in the Preface: "I had a certain fear that in criticising that famous theory I might be occupied in slaying the already slain. Recent experience has, however, convinced me that the theory is still, in a sense, alive, or at least capable of mischief. Though disclaimed by almost all our more careful writers on politics and ethics, it yet

remains a commonplace of the newspaper and the platform, not only in the United States of America, where the theory may be said to form part of the national creed, but in this country, where it was assailed a century ago by both Burke and Bentham" (David G. Ritchie, *Natural Rights: a Criticism of Some Political and Ethical Conceptions*, 2d ed.).

26. See also Benjamin F. Wright, *American Interpretations of Natural Law*, esp. pp. 291ff.

27. Woodrow Wilson, *Constitutional Government in the United States*, p. 161.

28. Max Huber, *Die soziologischen Grundlagen des Völkerrechts*, pp. 95ff.

29. This idea of universal solidarity appears also in the following passage in Oppenheim's *International Law*, Vol. I (§§ 292ff.): "there is no doubt that, should a State venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the Powers to exercise intervention for the purpose of compelling such State to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilisation." In another passage (§ 137) Oppenheim refers to cases in which the Powers have intervened in the affairs of other nations "in the interest of humanity." He declares, however (§ 292), that a guarantee of the so-called rights of mankind cannot be found in these facts.

6: THE DOCTRINE OF THE NATURAL INTERESTS OF MEN

1. In Kant's terminology, republican government is not incompatible with monarchy.

2. In his essay on *Perpetual Peace* Kant does not say anything regarding the organization of the league of free states. In his *Metaphysics of Ethics* (Part II, para. 61) he mentions a permanent international congress.

3. Following Hobbes rather than Pufendorf, Kant regards the state of nature as a state of war. He expressly rejects the theories which establish a distinction between wars permitted and wars prohibited by law and declares that the rules laid down in this respect by Grotius, Pufendorf, and Vattel have not the slightest legal force.

4. Jean Jacques Rousseau, *L'Etat de guerre, and Projet de paix perpétuelle*, pp. 62ff.

5. *Perpetual Peace*, p. 42 (Second Addendum to the definitive articles for perpetual peace).

6. *Ibid.*, pp. 26ff.

7. See above, n. 141 to Chapter 3.

8. See above, pp. 51ff.

9. Christian L. Lange, *Histoire de l'internationalisme*, p. 14. The French text reads: "L'internationalisme s'allie naturellement à tous les efforts démocratiques à l'intérieur des États, qui tendent vers leur transformation en des sociétés libres et volontaires, fondées sur le *consentement et non pas sur le principe de sujétion*."

10. *Ibid.*, p. 12. The French text reads: "L'internationalisme est par définition opposé au cosmopolitisme, lequel est unitaire, envisageant l'humanité tout entière comme un seul groupement social."

11. First published in 1848.

12. III. xvii. 5.

13. The representative writings of the physiocratic school were published in the sixth, seventh, and eighth decades of the eighteenth century.

14. First published in 1776.

15. Adam Smith *Wealth of Nations* IV. ix (p. 651 in Modern Library edition).

16. See, on this question, John Maynard Keynes, *The End of Laissez-Faire*, pp. 17ff.

17. It may be noted that John Stuart Mill, whose opinion on the moral effects of international commerce has been quoted above, was as much a political philosopher as an economist. This fact is indicated in the full title of the book that contains the passage in question, *Principles of Political Economy with Some of Their Applications to Social Philosophy*. In v. xi. 7 Mill discusses the "Grounds and Limits of the Laissez-faire or Non-Interference Principle"; although recognizing the necessity of limiting the application of this principle, he regards it as a general rule: "Every departure from it, unless required by some great good, is a certain evil."

18. *History of the Rise and Influence of the Spirit of Rationalism in Europe*, II, 383.

19. *Ibid.*, II, 247.

20. *Ibid.*, II, 246.

21. *Ibid.*, II, 233. When Lecky's book was written, England had adopted a policy of free trade, and it seemed possible to expect the general adoption of such a policy.

22. *Ibid.*, II, 246.

23. *Ibid.*, II, 399ff.

24. *Ibid.*, II, 387.

25. *Ibid.*, II, 388.

26. *Ibid.*

27. *Ibid.*, II, 386.

28. *Ibid.*, II, 400.

29. *Ibid.*, II, 388.

30. *Ibid.*

31. *Ibid.*

32. *Ibid.*, II, 389.

33. *Ibid.*

34. *Ibid.*

35. *Ibid.*

36. Adam Smith already had distinguished between reasonable and selfish, unreasonable, interests. This distinction appears clearly in the following passage from the Fourth Book of his *Wealth of Nations*: "To expect, indeed, that the freedom of trade should ever be entirely restored in Great Britain, is as absurd as to expect that an Oceana or Utopia should ever be established in it. Not only the prejudices of the public, but what is much more unconquerable, the private interest of many individuals, irresistibly oppose it" (iv. ii. [p. 437 in Modern Library ed.]). See also iv. iii, Part 2 (pp. 455ff.), on Smith's opinion concerning the rulership of merchants and manufacturers, an opinion which was much less optimistic than Lecky's view. Smith's prophecy concerning British trade policy had proved incorrect by the time Lecky wrote his book. Free trade had been "effected by political economy." This fact could seem to justify the hope of a steady increase in the general understanding of economic principles.

37. Lecky, *op. cit.*, II, 389.

38. Smith, *op. cit.*, Book iv, Introduction (p. 397 of Modern Library ed.).

39. Lecky, *op. cit.*, II, 233.

40. *Ibid.*, II, 390.

41. *Ibid.*, II, 383.

42. *Ibid.*

43. *Ibid.*

44. *Ibid.*, II, 295.

45. *Ibid.*, II, 384.

46. *Ibid.*, II, 389.

47. *Ibid.*, II, 394.

48. Lange, *op. cit.*, pp. 13ff. The French text reads: "L'internationalisme se base sur des considérations d'ordre économique: il voit dans l'interdépendance de plus en plus développée des peuples et des Etats un fait fondamental, qui aura nécessairement des conséquences sur les relations politiques entre ces mêmes groupes; l'organisation politique doit devenir l'expression naturelle et logique de la réalité économique et intellectuelle."

49. *Ibid.*, p. 14.

50. Carlton J. H. Hayes, *The Historical Evolution of Modern Nationalism*, p. 16.

51. See above, p. 62.

52. Christian Wolff *Jus gentium methodo scientifica pertractatum* i. 31 (p. 22 of Drake translation [see Bibliography]).

53. Lecky, *op. cit.*, II, 246.

54. Hugo Grotius *De jure belli ac pacis libri tres* II. vi. 4 (p. 261 of Kelsey translation [see Bibliography]). See also III. xx. 5 (p. 805 of translation).

55. From the viewpoint of the contract theory Kant, in his essay on *Perpetual Peace*, condemned certain methods used in his time for effecting changes of sovereignty without the consent of the communities concerned. In the second Preliminary Article for perpetual peace, he laid down the rule that it should not be possible for a state to acquire another state, whether small or great, "by inheritance, exchange, purchase or deed of gift" (p. 20).

56. Lecky, *op. cit.*, II, 245.

57. See *ibid.*, II, 247, where Lecky speaks of "the collision of the two hostile doctrines of the Divine right of kings and the rights of nations."

58. *Ibid.*

59. *Ibid.*, II, 246.

60. *Ibid.*, II, 247.

61. Lange, *op. cit.*, p. 13. The French text reads: "L'internationalisme veut se fonder sur les nations, et, en attendant la constitution de celles-ci en groupements sociaux autonomes, il reconnaît les États comme les représentants, encore imparfaitement légitimes, des groupes partiels au sein de la grande société des nations."

62. *Ibid.*, p. 14. The French text reads: "il est convaincu que le développement des nationalités ne peut que servir l'ensemble des intérêts internationaux par la variété et la richesse qui seront ainsi garanties à la vie commune des nations."

63. Lecky, *op. cit.*, II, 248.

64. *Ibid.*

7: THE IDEA OF PROGRESS AND THE BELIEF IN THE POWER OF PUBLIC OPINION

1. John B. Bury, *The Idea of Progress: an Inquiry into Its Origin and Growth*, pp. 348ff.

2. *Ibid.*, p. 24.

3. Immanuel Kant, *Perpetual Peace*, p. 42.

4. *Ibid.*, Appendix II, p. 53.

5. William Ladd, "Essay on a Congress of Nations," in *Prize Essays on a Congress of Nations*, pp. 509-638.

6. *Ibid.*, p. 600.

7. *Ibid.*, p. 601.

8. *Ibid.*, "Advertisement," p. 512.

8: THE NINETEENTH-CENTURY CONCEPT OF THE UNDESIRABILITY OF A WORLD STATE

1. Vol. I. The quotations following are from the second revised edition of 1879; the Introduction in which the passages in question appear was first published in the edition of 1861.

2. *Ibid.*, p. v.

3. *Ibid.*, p. 30. The French text reads: "Il y a dans l'humanité un élément d'unité et un élément de diversité. Les nations sont l'élément de diversité."

4. *Ibid.*, p. 14: "En effet, les nations ont également leur individualité; elle est aussi sacrée que celle des hommes, l'une et l'autre viennent de Dieu."

5. *Ibid.*, p. 30: "Pour que ce but soit atteint, il faut répartir en quelque sorte la tâche entre les divers membres du genre humain; de là la division des hommes en nations: chacune a son ministère dans l'œuvre commune de l'humanité."

6. *Ibid.*, p. 31.

7. *Ibid.*, pp. 14ff.

8. *Ibid.*, p. 16: "L'opinion publique est devenue dans les temps modernes une puissance redoutable; aucun esprit sensé ne la traitera de chimère; sa force va en grandissant et le moment approche où ni individus ni peuples n'y pourront résister."

9. *Ibid.*, p. 17: "c'est une puissance invisible qui domine les peuples, la puissance des idées et des sentiments."

10. *Ibid.*, p. 18.

11. *Ibid.*, pp. 14, 32.

12. *Ibid.*, p. 33: "Grâce à un concours heureux de circonstances, les rapports entre les nations prennent tous les jours une plus grande extension; les barrières que les préjugés, les intérêts opposés, les croyances hostiles élevaient entre les peuples, tombent l'une après l'autre."

13. *Ibid.*

14. *Ibid.*, pp. 33ff.: "Les éléments dont la future unité se composera font encore défaut, les nations ne sont pas encore constituées; comment pourrait-on prétendre leur assigner des lois?" See also p. 38: "L'idée de nationalité, avec les droits et les obligations qui en dérivent, entre à peine dans la conscience générale. . . . L'idée de l'unité,

tout aussi essentielle pour notre science, demande également un travail qui n'est point fait."

15. *Ibid.*, p. 38: "la science du droit international est toujours à faire." Like the adherents of the natural-law school, and for the same reasons, Laurent uses the terms "international law" and "science of international law" interchangeably.

16. *Ibid.*, p. 37.

17. *Ibid.*, p. 33: "le droit international se réduit en réalité à poser le principe de la souveraineté nationale, et à en déduire les conséquences."

18. *Ibid.* See also p. 37, where Laurent says, with regard to the treatises on positive international law: "Nous n'avons jamais pu prendre un pareil droit au sérieux: il est bon tout au plus pour les attachés et les secrétaires de légation."

19. *Ibid.*, p. 19.

20. *Ibid.*, p. 15: "l'anarchie qui règne aujourd'hui entre les Etats n'est pas plus grande que celle qui existait au moyen-âge dans les relations individuelles."

21. *Ibid.*, p. 31: "L'humanité étant une, elle doit arriver à une organisation qui lui permette de remplir sa destinée."

22. *Ibid.*, p. 33.

23. *Ibid.*, p. 39.

24. *Ibid.*, p. 42: "La guerre diminue par les progrès naturels de l'humanité, sans qu'il soit besoin de réunir tous les peuples en un seul Etat."

25. *Ibid.*, p. 41: "Considéré comme gardien de l'ordre public, l'Etat est une nécessité pour la coexistence des individus; il n'est pas une nécessité pour la coexistence des nations."

26. *Ibid.*, pp. 41ff.: "L'Etat a affaire à des individus réels, à des personnes physiques; il doit avoir à certains égards un empire absolu sur ses membres, sinon la coexistence des hommes serait impossible; voilà pourquoi on dit que les citoyens sont *subjects*; ils sont en effet assujettis à une puissance souveraine, celle de la loi. En est-il de même des nations dans leurs rapports avec l'humanité? Il nous semble que non. Les nations sont des êtres moraux; il n'est pas besoin, en général, d'une autorité supérieure pour les maintenir dans les limites du devoir; par cela seul qu'elles existent, c'est-à-dire qu'elles sont organisées, elles présentent des garanties d'ordre que n'offrent pas les individus. Les progrès de la civilisation mettent fin au brigandage international; il ne faut pour cela ni code pénal, ni tribunaux, ni gendarmes; tandis que dans l'intérieur de chaque Etat, la justice répressive est une nécessité permanente, qu'aucun progrès de la civilisation ne fera disparaître. Il se commet tous les jours des crimes, tous les jours la vie et la propriété des individus sont menacées. Les attentats contre l'exis-

tence d'une nation sont un rare accident dans l'histoire modern, et l'on peut hardiment affirmer qu'ils deviendront un jour impossibles; pour les prévenir, il suffit de la puissance de l'opinion publique. Il y a donc une différence profonde entre les individus et les nations: les premiers ont leurs vices et leurs passions, qui les portent sans cesse au mal; les autres sont des êtres fictifs qui régulièrement ont pour organes les hommes les plus intelligents et les plus moraux de leur temps; et alors même que l'intelligence et la moralité leur font défaut, l'opinion publique les contient et les contiendra de plus en plus dans les limites du devoir."

27. *Ibid.*, p. 40.

28. *Ibid.*, p. 44.

29. *Ibid.*, pp. 42ff.: "Dira-t-on que l'Etat universel finira par être si fortement organisé que toute résistance sera impossible, et que la pensée de résister ne viendra pas plus aux nations qu'elle ne vient aujourd'hui aux individus? Si c'est là l'idéal de la monarchie universelle, nous protestons de toutes nos forces contre cet idéal. La puissance souveraine, dont la mission est de sauvegarder le droit, peut se laisser emporter, par les mauvaises passions de ceux qui l'exercent, à violer le droit; la résistance devient alors le plus sacré des devoirs: malheur aux peuples s'ils étaient soumis à une puissance telle, qu'ils perdraient jusqu'à l'idée de lui résister! Ce serait pour le coup le tombeau de l'humanité. La paix régnerait dans le monde, mais ce serait la paix de l'empire romain, c'est-à-dire la servitude. Nous préférons mille fois les vices de l'organisation actuelle, qui rend au moins la résistance possible, à une organisation qui donnerait à l'humanité la paix dont jouissent les troupeaux. Ceci est une objection capitale contre la monarchie universelle. Toutes les garanties imaginables ne préviennent pas le danger de la violation du droit dans les Etats particuliers. Ceux qui ont le pouvoir en main sont toujours disposés à en abuser: que serait-ce si la puissance du genre humain était concentrée dans un seul Etat? Cet Etat aurait des organes; des hommes qui disposeraient des forces de l'humanité, seraient-ils plus portés à respecter le droit que ceux qui ne disposent que des forces d'un seul Etat? Inutile d'insister, la conscience humaine répond: Non, la paix n'est pas l'idéal suprême du genre humain; elle n'est, après tout, qu'un moyen. L'idéal, c'est le droit, la justice: or, la dernière arme du droit violé, c'est l'insurrection. Bénissons l'imperfection de notre état social qui nous permet d'avoir recours à ce moyen suprême; du jour où la résistance serait impossible, le droit ne serait plus qu'un vain mot, et le droit périssant, l'humanité périrait."

30. *Ibid.*, pp. 44ff.

31. *Ibid.*, p. 53.

32. *Ibid.*, p. 32.

33. *Ibid.*, p. 45: "Il y a une unité supérieure à celle qui a son principe et sa sanction dans la loi et dans la force qui l'accompagne, c'est l'unité qui se fonde sur des croyances communes, sur des idées et des intérêts communs. Telle est l'unité vers laquelle s'avancent les nations civilisées. Cette unité pourra prendre un jour des formes extérieures, mais ce ne sera pas une unité de coaction, telle que l'unité de l'Etat; elle reposera sur le concours volontaire du consentement, elle sera le résultat du contrat et non de la loi. En d'autres termes, nous croyons que c'est par voie d'association libre que l'unité s'établira, association qui laissera la souveraineté des nations intacte, et garantira plutôt qu'elle n'absorbera leur indépendance."

34. *Ibid.*, pp. 20ff.

35. *Ibid.*, pp. 23ff.

36. *Ibid.*, pp. 27ff. See also p. 28: "la réforme devint le principe de ce droit nouveau dont nous recherchons les fondements et le caractère. Il est si vrai que le droit international est dû à l'inspiration de la réforme, qu'on peut presque le qualifier de science protestante." See above, p. 27, on the Protestant character of the science of international law.

37. See, for instance, Thomas Alfred Walker, *A History of the Law of Nations*, I, 94. After referring to the failures of the medieval empire and of the papacy as supranational authorities, this author says: "And perchance the world profited by the double failure. The realisation of the ideal of Hildebrand, the creation of a Church Militant of the people of Earth . . . might, like the realisation of the dreams of Karl and Otto, have satisfied the aspirations of theorists like Leibnitz, but would have bound mankind for ever in the choking fetters of hopeless slavery. The mind feeds and grows on liberty. The World Empire and the World Church promised peace, but it was the peace of infallible, indisputable and irresponsible authority, the peace of a living death: the World chose independence, which offers peradventure the best gage for expansion and real life."

9: THE COMBINATION OF THE POSITIVIST THEORY OF INTERNATIONAL LAW WITH THE PROGRESSIVE CONCEPT OF A DEMOCRATIC UNION OF FREE NATIONS

1. Lassa F. L. Oppenheim, *International Law: a Treatise*, I, 178ff. (§§ 124ff.).

2. *Ibid.*, I, 200 (§ 141).

3. An English translation appeared in 1921: Lassa F. L. Oppenheim, *The Future of International Law*. The references following are to this English translation.

4. *Ibid.*, p. 10 (§ 15).

5. *Ibid.*, p. 16 (§ 23).

6. *Ibid.*, p. 17 (§ 24).

7. *Ibid.*, p. 11 (§ 16).

8. *Ibid.*, p. 16 (§ 22).

9. *Ibid.*, p. 12 (§ 18). See *ibid.*: "Distance has been so conquered by the telegraph, the railway, and the steamboat, that in fact the annual assembly of a world-parliament would be no impossibility, and in any case a world-government, wherever its seat might be, would be able to secure almost immediate obedience to its behests in the uttermost parts of the earth."

10. *Ibid.*, p. 13 (§ 18). Although Oppenheim regards the creation of a federal world state as possible, he doubts its usefulness because such a state would not necessarily exclude war. As the example of the American War of Secession shows, there always exists in a confederation the danger of civil war. *Ibid.*, pp. 13ff. (§§ 19ff.). If this were a valid argument against universal government, it would at the same time prove the uselessness of the individual state, the unity of which can always be disrupted by revolution and civil war. Oppenheim, of course, does not wish to question the usefulness of the state as an institution. His argumentation in this case shows how opposition to the world state leads the progressive thinker to seek a completely perfect solution of the international problem—that is, a solution which is free from all deficiencies of state government.

11. *Ibid.*, p. 21 (§ 29).

12. *Ibid.*, p. 13 (§ 18): "So far as we can foresee, the development of mankind is inseparably bound up with the national development of the different peoples and states. In these conditions variety brings life, but unity brings death."

13. In his treatise on *International Law*, II, 81 (§ 51), Oppenheim says: "The principle of nationality is of such force that it is fruitless to try to stop its victory."

14. *Future of International Law*, p. 16 (§ 23).

15. *Ibid.*, p. 66 (§ 76). In his treatise on *International Law*, I, 83 (§ 51), Oppenheim declared that "the progressive development of International Law depends chiefly upon the standard of public morality on the one hand, and, on the other, upon economic interests. . . . It may therefore fearlessly be maintained that an immeasurable progress is guaranteed to International Law, since there are eternal moral and economic factors working in its favour."

16. *Future of International Law*, p. 55 (§ 66).

17. *Ibid.*, p. 54 (§ 65).

18. See above, p. 85.

19. *Ibid.*, p. 24 (§ 31).

20. *Ibid.*, p. 33 (§ 41).

21. *Ibid.*, p. 21 (§ 28).

22. *Ibid.*, p. 18 (§ 26).

23. *Ibid.*, p. 24 (§ 31).

24. *Ibid.*, p. 18 (§ 25).

25. *Ibid.*, p. 23 (§ 30).

26. *Ibid.*, p. 24 (§ 30).

27. *Ibid.*, p. 19 (§ 26).

28. *Ibid.*, p. 23 (§ 30).

29. *Ibid.*, p. 31 (§ 39).

30. *International Law: a Treatise*, I, 23ff. (§§ 18ff.): "General International Law has a tendency to become universal because such States as hitherto do not consent to its will in future either expressly give their consent or recognise the respective rules tacitly through custom."

31. *Future of International Law*, p. 31 (§ 39).

32. *Ibid.*

33. *Ibid.*

34. *Ibid.*, p. 21 (§ 28).

35. *Ibid.*, p. 4 (§ 6). Before the Hague Peace Conferences, international law was "essentially a book law, a system erected by greater or smaller authorities on the foundations of state practice and in its details often uncertain and contested" (p. 5 [§ 8]).

36. *Ibid.*, p. 56 (§ 67).

37. Christian Wolff *Jus gentium methodo scientifica pertractatum* Prolegomena 20 (p. 16 of Drake translation [see Bibliography]).

38. *Future of International Law*, p. 24 (§ 31).

39. *Ibid.*, p. 14 (§ 20).

40. It has been shown above (pp. 106f.) that modern constitutional law is conceived of as positive law of a higher character than ordinary law. The codified international law of the future, which is supposed to make the states' subjection to the rule of law complete, would correspond to a similar concept of positive law.

41. See above, p. 93.

42. *Future of International Law*, p. 41 (§ 50).

43. *Ibid.*

44. See Article 16 of the Convention for the Pacific Settlement of International Disputes, adopted by the first Hague Peace Conference, July 29, 1899.

45. The second Hague Peace Conference adopted a draft convention regarding the establishment of a real international court, a "cour de justice arbitrale." Oppenheim objects to the use of the term "justice arbitrale" because it "obliterates the boundary line

between the arbitral and the strictly judicial decision of international disputes" (*International Law: a Treatise*, I, 525 [§ 476b]).

46. *Future of International Law*, p. 46 (§ 57).

47. *Ibid.*, p. 47 (§ 57).

48. *Ibid.*, p. 47 (§ 58).

49. *Ibid.*, p. 48 (§ 59).

50. *Ibid.*

51. *Ibid.*

52. *Ibid.*, p. 50 (§ 60).

53. *Ibid.*, p. 14 (§ 20).

54. *Ibid.*, p. 48 (§ 59).

55. *Ibid.*, p. 53 (§ 63).

56. *Ibid.*, p. 54 (§ 65).

57. *Ibid.*, p. 51 (§ 61).

58. *Ibid.*

59. *Ibid.*, p. 54 (§ 64).

60. *Ibid.*, p. 44 (§ 54).

61. *Ibid.*, p. 55 (§ 66).

62. *Ibid.*, p. 48 (§ 59).

63. Otfried Nippold, *Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten*, pp. 19-25.

64. *Ibid.*, p. 30.

65. *Future of International Law*, p. 17 (§ 23).

66. *Ibid.*, p. 18 (§ 25): "in the continuous struggle between *international* and *national* interests the latter will only slowly prepare themselves to yield."

67. *Ibid.*, p. 67 (§ 77).

68. *Ibid.*

69. *Ibid.*

70. *Ibid.*

71. *Ibid.*, p. 56 (§ 67).

72. *International Law: a Treatise*, I, 82 (§ 51).

73. The fact that so much of the work of The Hague Peace Conferences is concerned with the rules of warfare and neutrality evidently does not seem to Oppenheim to be inconsistent with his idea that these Conferences have inaugurated a new era of peaceful cooperation between states. It appears to him to be of fundamental importance that the representatives of numerous states have come together and, instead of dealing with concrete political problems, have laid down legal rules to be observed in the future by all members of the international community. The progressive thinker's interest in questions of procedure frequently makes him ignore the particular nature of the case in which a certain procedure is followed. He there-

fore is inclined to assume that, if a certain method has been successfully used in a specific case, the same method will also produce good results when it is applied to matters of a different character. Thus, *for instance, Christian Lange says in a passage where he deals with the progress of international law in the nineteenth century: "L'interdiction de la traite est la première réforme d'ordre humanitaire qui fut réalisée par voie internationale; elle a toujours servi de suprême argument aux amis de la Paix, pendant la période qui nous occupe, lorsqu'on leur reprochait verser dans l'utopie, en faisant des motions en faveur de l'arbitrage et du désarmement"* ("Histoire de la doctrine pacifiste et de son influence sur le droit international," Académie de Droit International, *Recueil des cours*, XIII (1926-III), 383.

74. *Future of International Law*, p. 68 (§ 77).

10: THE FIRST WORLD WAR AND THE RISE OF THE LEAGUE OF NATIONS

1. See, for instance, Wilson's address made at Helena, Montana, September 11, 1919: "All the thoughtful men in Germany, so far as I have been able to learn, who were following peaceful pursuits—the bankers and the merchants and the manufacturers—deemed it folly to go into that war. They said so then and they have said so since, but they were not consulted. The masters of Germany were the general military staff" (U.S. Senate, 66th Congress, 1st Session, *Addresses of President Wilson . . . on His Western Tour, September 4 to September 25, 1919, on the League of Nations, Treaty of Peace with Germany*, p. 141). See also *ibid.*: "A great war cannot begin with public deliberation. A great war can begin only by private plot."

2. See Wilson's address in Bismarck, North Dakota, September 10, 1919: "At the heart of Europe there were suffering peoples, inarticulate but with hearts on fire against the iniquities practiced against them; held in the grip of military power and submitting to nothing but force; their spirits insurgent; and so long as that continued, there could not be the expectation of continued peace" (*ibid.*, p. 118).

3. Wilson at Indianapolis, September 4, 1919 (*ibid.*, p. 20).

4. See Wilson's address at Billings, Montana, September 11, 1919: "Thousands of our gallant youth lie buried in France and buried for what? For the redemption of America? America was not directly attacked. For the salvation of America? America was not immediately in danger. No, for the salvation of mankind" (*ibid.*, p. 7).

5. Shortly after the war the French jurist, Léon Duguit, declared that before the war it might have been possible to regard international law as a set of rules of merely moral character. The German aggres-

sion then seemed to demonstrate that belief in these rules was a complete illusion. Brutal force alone seemed to govern the world. But in the course of the war the situation changed fundamentally. "Puis, les événements se sont déroulés avec une logique implacable. La conscience mondiale en un formidable sursaut s'est insurgée; tous les peuples civilisés de la terre se sont levés et se sont unis contre le violateur de la norme internationale. Seules, quelques nations impuissantes, dégénérées ou encore barbares, sont restées muettes ou ont deserté la cause du droit. Spontanément s'est formé un faisceau de forces irrésistibles qui a imposé aux gouvernements allemands le respect du droit et qui a décidé de punir leur forfaits, d'exiger des réparations et des garanties" (*Traité du droit constitutionnel*, 2d ed., I, 107). Such ideas were not only expressed by authors who were nationals of one of the allied countries. In the summer of 1918 a Dutch author wrote: "nothing could be more disheartening than the discovery that the war of 1914 should present the same aspect as the wars of one or two centuries back. If this should prove to be the case what could then give us the courage to hope that things will be different a hundred or two hundred years hence? The very fact that all over the world (by no means in belligerent countries only) this war is regarded as a struggle between crime and punishment, gives a hopeful outlook on the future" (Cornelis van Vollenhoven, *The Three Stages of the Law of Nations*, p. 64).

6. Wilson asserted that this opinion was shared by every statesman he had met in Europe (see U.S. Senate, *op. cit.*, p. 181).

7. "You can not afford to discuss a thing when you are in the wrong, and the minute you feel that the whole judgment of the world is against you, you have a different temper in affairs altogether" (*ibid.*, p. 111).

8. See, for instance, Wilson's San Diego, California, address, September 19, 1919 (*ibid.*, p. 279).

9. In his address at Minneapolis, September 9, 1919, Wilson said: "The old order of things was not to depend upon the general moral judgment of mankind, not to base policies upon international right, but to base policies upon international power. So there were drawn together groups of nations which stood armed, facing one another. . . . This group of nations thought that it represented one set of principles; that group of nations thought that it represented another set of principles and that the best that could be accomplished in the world was this that they used to call the balance of power.

"Notice the phrase. Not the balance that you try to maintain in a court of justice, not the scales of justice, but the scales of force; one great force balanced against another force. Every bit of the policy of the world, internationally speaking, was made in the in-

erest of some national advantage on the part of the stronger nations of the world" (*ibid.*, pp. 99ff.).

10. In his speech in Minneapolis, September 9, 1919, Wilson told his audience: "I do not think you realize what a change of mind has come over the world. As we used to say in the old days, some men that never got it before have got religion" (*ibid.*, p. 104).

11. Address at Billings, Montana, September 11, 1919 (*ibid.*, p. 130).

12. *Ibid.* See also pp. 257, 286, 329, 337, 360.

13. Address at Denver, Colorado, September 25, 1919 (*ibid.*, p. 349).

14. Address at Spokane, Washington, September 12, 1919 (*ibid.*, p. 166).

15. In his *International Government*, a study prepared for the Fabian Research Department and published in 1916, Leonard S. Woolf declared: "I do assert that the legal, political, and diplomatic theories of the independence and sovereignty of States are illogical and the result of confused and timid thinking, and that the passion, directed and controlled only by false theory, is destructive of the best things in society which mankind has so slowly and so laboriously acquired" (p. 349).

16. van Vollenhoven, *The Three Stages of the Law of Nations*, p. 59. The similarity between Grotius' concept and the League of Nations idea was stressed by the same author in *Grotius and Geneva*, pp. 5ff. See also Maurice Bourquin, "Grotius et les tendances actuelles du droit international," *Revue de droit international et de législation comparée*, 3d ser., VII (1926), 86-125; Georges Gurvitch, "La Philosophie du droit de Hugo Grotius et la théorie moderne du droit international," *Revue de métaphysique et de morale*, XXXIV (1927), 365-91.

17. Official British Commentary to the Covenant (see Bibliography, under Great Britain). This Commentary can be regarded as representing the viewpoint of the British delegates to the Commission of the Peace Conference which drafted the Covenant.

18. David Hunter Miller, *The Drafting of the Covenant*, II, 562. The British Commentary declares that "the ultimate and most effective sanction [of the Covenant] must be the public opinion of the civilized world."

19. In the Declaration of Independence it was said that "a decent respect for the opinions of mankind" required the peoples of the Colonies to declare the causes which impelled them to the separation. Referring to this passage, President Wilson stated that "America was the first to set that example, the first to admit that right and justice and even the basis of revolution was a matter upon which mankind

was entitled to form a judgment" (Address at San Francisco, September 17, 1919, in U.S. Senate, *op. cit.*, p. 224). See also his address at Oakland, California, September 18, 1919 (*ibid.*, p. 262). This American example of submitting matters of universal importance to the judgment of public opinion now was to be generally followed.

20. In one of the speeches made on his western tour, at Coeur d'Alene, Idaho, September 12, 1919, President Wilson said: "I hope every intelligent man belongs to the progressive thought. It is the only thought that the world is going to tolerate" (*ibid.*, p. 159). Here the term "progressive thought" evidently is used in the sense of the concept analyzed in this study.

21. With regard to this character of the League, see the following statement in the official British Commentary to the Covenant: "If the nations of the future are in the main selfish, grasping, and warlike, no instrument or machinery will restrain them. It is only possible to establish an organisation which may make peaceful cooperation easy and hence customary, and to trust in the influence of custom to mould opinion."

22. See above, pp. 59-60.

23. U.S. Department of State, *Papers Relating to the Foreign Relations of the United States: the Lansing Papers, 1914-1920*, II, 118ff.

24. Lansing explained the relationship between democracy and peace in the following words: "No people on earth desire war, particularly an aggressive war. If the people can exercise their will, they will remain at peace. If a nation possesses democratic institutions, the popular will will be exercised. Consequently, if the principle of democracy prevails in a nation, it can be counted upon to preserve peace and oppose war" (*ibid.*).

25. *The New York Times*, October 20, 1920, quoted by Ruhl J. Bartlett, *The League to Enforce Peace*, p. 192.

11: THE IDEA OF COLLECTIVE SECURITY

1. It is not intended here to present a complete description of the Covenant or even of its most important clauses. Only an analysis of its guiding principles will be attempted. No reference is made to the history of the League, for any general conclusion derived from the League's actual practice could always be contradicted on the basis of the not easily refutable argument that the particular circumstances in which this organization had to work and which were not foreseen at the time of the drafting of the Covenant were responsible for the institution's development.

2. The French text runs as follows: "Il est expressément déclaré que toute guerre ou menace de guerre qu'elle affecte directement ou

non l'un des Membres de la Société intéresse la Société tout entière."

3. On the hypothetical "as if" character of the League concept of solidarity, see Arnold Wolfers, *Britain and France between Two Wars; Conflicting Strategies of Peace since Versailles*, pp. 334ff.

4. In its original form the Covenant mentioned, besides inquiry by the Council, only arbitration, not judicial settlement. This situation was changed by an amendment which entered into force in 1924.

5. Equivalent to unanimous recommendations of the Council were those adopted by the Assembly by a certain majority in case the dispute was referred to that body. As to the execution of arbitral awards and judicial decisions, it was only provided in the Covenant (Article 13, para. 4) that the Council was to propose what steps should be taken to give effect to such an award or decision in the event of any failure to carry them out.

6. "War is a process of heat" (U.S. Senate, 66th Congress, 1st Session, *Addresses of President Wilson . . . on His Western Tour, September 4 to September 25, 1919, on the League of Nations, Treaty of Peace with Germany*, p. 33).

7. In the paper which General Smuts wrote on the future international organization, it was said: "The common view is that, if such a period of deliberation and delay is established, there will be time for extreme war passions to cool down, and for public opinion to be aroused and organized on the side of peace. And in view of the enormous force which public opinion would exert in such a case, the general expectation is that it will prove effective, and that the delay, and the opportunity thus given for further reflection and the expression of public opinion, will in most cases prevent the parties from going to war. Then, although the engagement of the disputants is only to delay action pending the inquiry into or hearing of their case and the issue of a decision or report, the actual effect of the delay will in most cases be more far-reaching, and the threatened war may be prevented altogether" (Jan C. Smuts, "The League of Nations; a Practical Suggestion" in David Hunter Miller, *The Drafting of the Covenant*, II, 23-60, Doc. 5; text at p. 53).

8. Article 15, para. 7.

9. Article 5 of the Covenant. Generally only matters of procedure could be decided by a majority vote. One of the exceptions to the unanimity rule was the provision concerning the report just mentioned, which could be adopted by the Council without the concurrence of the parties to the dispute.

10. The Covenant set up formal criteria for the determination of an illicit war. It prohibited the resort to war under certain conditions without making distinctions regarding the justness of the cause. The causes of the conflict were to be examined by the Council or by

arbitrators or judges. But it seems to have been supposed that as a rule states advancing unjust claims would be especially inclined to go to war.

11. D. H. Miller, *The Drafting of the Covenant*, II, 562.

12. *Ibid.* Wilson clearly considered public opinion to be the highest world organ and in this capacity to be capable of deciding difficult legal problems. When the League of Nations Commission of the Peace Conference discussed the clause providing for abrogation of the League members' obligations inconsistent with the Covenant, the President expressed the opinion that public opinion was the only authority which could decide the question of consistency or inconsistency. He declared that "the decision of the court of public opinion will be much more effective than that of any tribunal in the world, since it is more powerful and is able to register its effects in the face of technicalities. Frequently the law decides one way and public opinion gives judgment in a manner that is broader and more equitable" (*ibid.*, II, 280).

13. Harold W. V. Temperley, ed., *A History of the Peace Conference of Paris*, VI, 532.

14. Speaking of the economic sanctions in Indianapolis on September 4, 1919, Wilson said: "I would a great deal rather be put out of the world than live in the world boycotted and deserted. The most terrible thing is outlawry. The most formidable thing is to be absolutely isolated" (U.S. Senate, *op. cit.*, p. 23). In the same connection he said in Seattle on September 13, 1919: "It is the soul that is wounded much more poignantly than the body" (*ibid.*, p. 194).

15. The Commentary explained the legal situation as follows: "It is the duty of the Council . . . to recommend what effective forces each Member of the League shall supply; for this purpose each Member from which a contribution is required has the right to attend the Council, with power of veto, during the consideration of its particular case."

16. League of Nations, *Records of the Second Assembly, Plenary Meetings*, p. 453.

17. See the Report of the Third Committee of the Second Assembly (*ibid.*, p. 424).

18. The British Commentary said that each state was "justified" in breaking off relations with the offending state on its own initiative.

19. Wilson expressed this opinion in a conference with members of the Senate Committee on Foreign Relations on August 19, 1919 (*Congressional Record*, Vol. LVIII, Part 4, pp. 4014, 4017).

20. *Ibid.*, p. 4019. In the course of this discussion Wilson finally declared that "in international law the word 'legal' does not mean the same as in national law, and the term hardly applies."

21. The clause enumerating the classes of disputes generally suited for arbitral or judicial settlement was inserted in order "to meet the opinion, widely and strongly held in England and the leading Neutral Countries, that the provisions of the Covenant with regard to the settlement of disputes by arbitral process are not sufficiently progressive. It has been largely argued that the provisions of the Covenant as originally published were, in this particular direction, actually retrogressive as not sufficiently recognizing the distinction evolved in recent years between justiciable and non-justiciable disputes" (Note by the British Delegation, in Miller, *op. cit.*, I, 416).

22. In his speech at Columbus, Ohio, on September 4, 1919, Wilson said: "The passions of this world are not dead. The rivalries of this world have not cooled. They have been rendered hotter than ever. The harness that is to unite nations is more necessary now than it ever was before" (U.S. Senate, *op. cit.*, p. 8).

23. It has been seen above that Oppenheim regarded arbitration as a method for settling disputes of a not strictly legal character. The Covenant regarded arbitration as a means of deciding legal disputes. The Council of the League was the organ designed to deal with political conflicts.

24. In Miller, *op. cit.*, II, 52.

25. *Ibid.*, II, 53.

26. *Ibid.*, II, 57.

27. *Ibid.*

28. *Ibid.*, II, 378.

29. See Lassa F. L. Oppenheim, *International Law: a Treatise*, 6th ed., II, 4ff.

30. Covenant of the League of Nations, Preamble.

31. The British official Commentary to the Covenant (see Bibliography, under Great Britain) stated: "At the present stage of national feeling, sovereign States will not consent to be bound by legislation voted by a majority, even an overwhelming majority of their fellows. But if their sovereignty is respected in theory, it is unlikely that they will permanently withstand a strong consensus of opinion, except in matters which they consider vital." The Commentary here expressed the same optimism which had inspired Oppenheim's ideas concerning international legislation. But the optimism was limited as far as the vital interests of states were concerned.

32. When the Covenant was drafted, it was expected that the Council would comprise the representatives of five Great Powers and those of four other states. Actually, the Great Powers were never in a majority; finally they were outnumbered considerably by the weaker states represented on that body.

33. See above, pp. 58–59.
34. See Wilson's address at San Diego, California, on September 19, 1919: The peace treaty is "a treaty where peace rests upon the right of the weak, and only the power of the strong can maintain the right of the weak" (U.S. Senate, *op. cit.*, p. 267).
35. Miller, *op. cit.*, I, 31.
36. Actually, the plebiscite was not used extensively for the territorial settlements taking place after the last war. See Temperley, *op. cit.*, VI, 556ff.
37. In his address at Columbus, Ohio, on September 4, 1919, Wilson declared that without a League of Nations the military point of view would necessarily have had to prevail with regard to the establishment of boundaries. U.S. Senate, *op. cit.*, p. 9.
38. Speaking of the peace negotiations, President Wilson said: "When strategic claims were urged, it was a matter of common counsel that such considerations were not in our thought. We were not now arranging for future wars. We were giving people what belonged to them" (*ibid.*).
39. Wilson's "First Paris Draft," Article III, in Miller, *op. cit.*, II, 70.

12: THE LEAGUE AS UNIVERSAL QUASI GOVERNMENT

1. Leonard S. Woolf in his *International Government*, to which reference has been made earlier, provides a typical example of this argumentation.
2. Harold W. V. Temperley, ed., *A History of the Peace Conference of Paris*, V, 432ff.
3. Article 17.
4. Article 1, para. 3.
5. See above, n. 12 to Chapter 11. Cf. also above, pp. 197, 206.
6. David Hunter Miller, *The Drafting of the Covenant*, II, 280.
7. The Preamble also spoke of open, just, and honorable relations between nations.
8. Wilson, in his address at Oakland, California, September 18, 1919 (U.S. Senate, 66th Congress, 1st Session, *Addresses of President Wilson . . . on His Western Tour, September 4 to September 25, 1919, on the League of Nations, Treaty of Peace with Germany*, p. 260).
9. Article 1, para. 2, of the Covenant provided that any fully self-governing state, dominion, or colony not belonging to the original League members could become a member of the institution. When

the Covenant was drafted, the term "self-governing" was understood as implying a democratic and representative form of government. In several of the speeches made on his western tour Wilson declared that no nation could be admitted to the League whose people did not control its government. See, e.g., his address made at Minneapolis, September 9, 1919, in U.S. Senate, *op. cit.*, p. 102. During the first year of the League's existence the Assembly interpreted Article 1 of the Covenant in the same sense. See, e.g., *Records of the First Assembly, Plenary Meetings*, p. 607. Later a state was considered to be self-governing when it was sovereign and independent. See, e.g., *Records of the Fifth Assembly, Plenary Meetings*, p. 470 (League of Nations, *Official Journal*, Special Supplement No. 23, 1924).

10. Part XIII, Section I, Preamble.

11. Address at Pueblo, Colorado, September 25, 1919 (U.S. Senate, *op. cit.*, p. 360).

12. *Ibid.*, p. 361.

13. In such a case the Council was to confine itself to issuing a report stating the fact that the matter in question was within the domestic jurisdiction of one of the states concerned.

14. Address at Billings, Montana, September 11, 1919 (U.S. Senate, *op. cit.*, p. 131).

15. Address at St. Paul, Minnesota, September 9, 1919 (*ibid.*, p. 113).

16. See, e.g., his address at Reno, Nevada, September 22, 1919 (*ibid.*, p. 311).

17. The idea that the typical case of oppression was rulership over a population belonging to a nation other than that of the majority of the people, and that freedom from foreign rule meant free institutions, explains why the League could so easily change its interpretation of the term "self-governing State" (Article 1, para. 2, of the Covenant) in the sense indicated above.

18. Wilson's address at Denver, Colorado, September 25, 1919 (U.S. Senate, *op. cit.*, p. 355).

19. Address at Spokane, Washington, September 12, 1919 (*ibid.*, p. 172).

20. It may be noted that the question of oppressed peoples was not regarded as limited to states of minor importance which had not yet reached a high degree of civilization. At the time when the Covenant was drafted many persons, especially in America, had the Irish question in mind when they spoke of the right of rebellion and secession. In Paris, President Wilson told Lord Robert Cecil, the British delegate to the League of Nations Commission, that in his opinion "the Irish question might get to such a state that its discussion in the League

of Nations might be inevitable, and Cecil said that he quite agreed with this" (Miller, *op. cit.*, I, 294).

21. See, e.g., *ibid.*, I, 166 (statement made by the French delegate Bourgeois at the League of Nations Commission of the Peace Conference). See also League of Nations, *Records of the First Assembly, Plenary Meetings*, p. 28 (statement by the Swiss representative Motta.)

22. In its Advisory Opinion of February 7, 1923, concerning the Tunis-Morocco Nationality Decrees, the Permanent Court of International Justice very clearly expressed this viewpoint: "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations" (Publications of the Permanent Court of International Justice, Series B, No. 4, p. 24).

23. Wilson's address at Pueblo, Colorado, September 25, 1919 (U.S. Senate, *op. cit.*, p. 361).

24. The British official Commentary to the Covenant (see Bibliography, under Great Britain) declares in the passage dealing with mandates: "No provision is made in the Covenant for the extension of such safeguards to the other similar dependencies of the Members of the League, but it may be hoped that the maintenance of a high standard of administration in the mandate territories will react favourably wherever a lower standard now exists, and the mandatory principle may prove to be capable of wide application." In Article 23(b) of the Covenant the members of the League undertook, subject to and in accordance with international conventions, "to secure just treatment of the native inhabitants of territories under their control."

25. See *Records of the 14th Ordinary Session of the Assembly, Meeting of the Committees, Minutes of the 6th Committee*, pp. 70ff. (League of Nations, *Official Journal*, Special Supplement No. 120, 1933).

26. Article 1, para. 2, of the Covenant provided that fully self-governing dominions and colonies also could be admitted as members of the League. This provision was applied, however, only in the case of a dominion belonging to the British Empire, portions of which were among the original members of the organization. No other dominion or colony was ever a League member.

27. League of Nations, *Procès-Verbal of the 5th Session of the Council*, p. 21.

28. League of Nations, *Records of the First Assembly, Plenary Meetings*, p. 320.

29. League of Nations, *Procès-Verbal of the 5th Session of the Council*, pp. 21, 31.

30. Address at Cheyenne, Wyoming, September 24, 1919 (U.S. Senate, *op. cit.*, p. 342).

31. See Miller, *op. cit.*, I, 274.

32. *Ibid.* The author of this proposal was General Smuts. In the Covenant as finally adopted, the terms "Assembly" and "Council" were used instead of "Body of Delegates" and "Executive Council."

33. Article 3, para. 4.

34. For the discussion of the Commission, see Miller, *op. cit.*, I, 231ff.

35. *Ibid.*, II, 561ff. In the League of Nations Commission, President Wilson declared: "The plain people and the working classes who have seen into what they have been led in the war by governments are made anxious by the thought that they will not be represented in this assembly" (*ibid.*, I, 231).

36. The first Assembly of the League considered it necessary to adopt a resolution in order to affirm this principle. It was said in this resolution that the Assembly had not the right "to interfere with the choice which a Member of the League may make of persons to represent it, nor to prevent a representative from saying what he pleases," but that it was essential that "it should be thoroughly understood that, when a Representative votes, the vote is that of the Member which he represents" (League of Nations, *Records of the First Assembly, Plenary Meetings*, p. 320).

37. Nevertheless, some importance still was attributed to the qualifications which were supposed to make a delegate truly representative of the people. For instance, the Norwegian delegate Hambro declared in the Assembly that the diplomatic element was too strong in that body. He considered the traditions of the diplomatic career not to be "in favour of publicity and openness." Diplomatic agents living in the countries close to the headquarters of the League, in his opinion, could not really represent the "Parliaments and the peoples themselves." League of Nations, *Records of the 8th Ordinary Session of the Assembly; Plenary Meetings*, p. 47; *Records of the 10th Ordinary Session of the Assembly, Meetings of the Committees, Minutes of the 4th Committee*, p. 26 (League of Nations, *Official Journal*, Special Supplement No. 79, 1929). In the eyes of the progressive, the diplomat essentially represented the state as a powerful unit which was engaged in power politics with other units of the same kind.

38. Miller, *op. cit.*, I, 233.

39. For this reason the hope that the protection of minorities would become the object of an unpolitical supervision by the community of mankind was not realized. Progressive writers complained that the Council of the League dealt generally with this question in a political manner, seeking a compromise between interested governments rather

than trying to secure the strict observance of the principles of justice laid down in the Minorities treaties. See, e.g., Georges Scelle, *Précis de droit des gens: principes et systématique*, II, 245ff.

13: THE LEAGUE AS CENTER OF NON-POLITICAL ACTIVITIES

1. Article 23(e). On the origin of this clause, see William E. Rappard, *Post-War Efforts for Freer Trade*, pp. 9-12.

2. *Ibid.*, pp. 12-43. In that author's view the League's activities in the economic field were "vain attempts made by the organised international community . . . to allow its members to secure from one another and each for itself the obvious benefits accruing to all from the nature-willed geographical division of labour" (*ibid.*, p. 44).

3. Section I, Preamble.

4. President Wilson regarded as unpolitical the interests of laboring men which the International Labour Organisation was to promote. Speaking of these interests, he said: "there is nothing political about it" (U.S. Senate, 66th Congress, 1st Session, *Addresses of President Wilson . . . on His Western Tour, September 4 to September 25, 1919, on the League of Nations, Treaty of Peace with Germany*, Address at Columbus, Ohio, September 4, 1919, p. 12).

5. The Assembly's budgetary power was an important element of that organ's right of supervising the technical activities of the League.

6. See League of Nations, *Records of the First Assembly, Plenary Meetings*, p. 340.

7. League of Nations, *Ten Years of World Co-operation*, p. 208.

8. *Ibid.*

9. The International Labour Organisation in which, in addition to governments, employers and workers were represented, seemed to constitute a model of international cooperation based on the interdependence of peoples.

10. This idea was very clearly expressed by William E. Rappard in the following sentence: "Le nationalisme économique s'oppose au libéralisme non comme le national à l'international, mais comme le politique à l'économique" (*Recueil d'études en l'honneur d'Edouard Lambert*, III, 402, quoted in Edmond Silberner, *La Guerre dans la pensée économique du XVIe au XVIIIe siècle*, p. 266).

11. In a study entitled *The Aims, Methods and Activity of the League of Nations* (see Bibliography, under League of Nations), p. 71, it was stated that "broad-visioned patriotism," which called for concessions to be made to other countries, was ultimately to a country's advantage.

12. One author, enumerating the advantages resulting for the League of Nations from the use of experts, mentioned the fact that they were less subject to the pressure of public opinion than were public officials. John I. Knudson, *A History of the League of Nations*, p. 202. Not the lack of insight nor the bad will of governments but the opinions of the various peoples themselves appeared to that author as obstacles to international collaboration, whose success depended on dispassionate reasoning. The conflict inherent in the concept underlying the League of Nations here becomes particularly clear. It was considered possible to organize, under the rule of universal reason, a world divided into independent states whose peoples regarded their interests as mutually antagonistic.

13. League of Nations, *Official Journal* (1930), p. 1534.

14. League of Nations, *Report of the Committee Appointed to Study the Constitution, Procedure and Practice of Committees of the League of Nations* (Official No.: A.16.1935; Publications No.: General 1935.3).

15. In its publication *The Aims, Methods and Activity of the League of Nations*, the League Secretariat went even further in stressing the necessary connection between the experts and their governments. It was stated there that members of the technical committees who were not governmental representatives could at any rate be regarded as "semigovernmental" because they were always more or less in touch with their governments and were "bound to consider the problems submitted to them, not merely from the technical standpoint, but also from that of practical policies" (p. 71). It was said further that even the members of committees dealing with essentially scientific problems (e.g., in the case of medical inquiries) should not be wholly devoid of a "national" character, "since there sometimes is a national element even in the most abstruse domains of science" (p. 72).

16. With regard to the Economic Committee, it was stated that its constitution was "well adapted for its purpose, subject to the consideration that a general programme is framed by a governmental body."

17. League of Nations, *The Development of International Cooperation in Economic and Social Affairs*, Report of the Special Committee (Official No.: A.23.1939; Publications No.: General 1939.3), p. 5.

18. *Ibid.*, pp. 5ff.

19. League of Nations, *Official Journal* (1939), p. 272.

20. This Central Committee served as a model for the separate Economic and Social Council of the United Nations. See Leland M.

Goodrich and Edvard Hambro, *Charter of the United Nations; Commentary and Documents*, p. 209.

21. League of Nations, *Development of International Co-operation* (work cited in n. 17, above), p. 19.

22. *Ibid.*, pp. 13ff.

23. *Ibid.*, p. 11.

24. *Ibid.*, p. 14.

25. *Ibid.*, p. 11.

26. *Ibid.* In another passage (p. 14) the Committee said: "Much of the League's work . . . is directed neither to indicating the manner in which national policies may best be coordinated nor to preparing the way for formal international agreements, but simply to promoting the spread of knowledge and enabling each country to learn from the experience of others."

27. This organization was invested with powers which were said to constitute a "restriction of national sovereignty"; international organs here were given the authority to issue binding decisions. See Herbert L. May, "Dangerous Drugs," in *Pioneers in World Order; an American Appraisal of the League of Nations*, p. 185.

28. In the paper referred to above, Mr. May, then vice-president of the Permanent Central Opinion Board and acting chairman of the Drug Supervisory Body, discussed the question of the future of the international drug service and considered the case that the League of Nations should not survive and that there should be no new world organization to which the tasks formerly performed by the League could be transferred. May, *op. cit.*, pp. 190ff. He foresaw that difficulties would arise in this case, but they obviously were of a merely technical nature; it would have become necessary to revise the international agreements which formed the basis of the international drug administration so that the functions, which under these agreements were exercised by the League, would be taken over by a special organization. Mr. May evidently did not fear that that administration would work less efficiently if it were not connected with any central organization. When the League's Advisory Committee on Traffic in Opium and Other Dangerous Drugs, a governmental body which together with the Central Opium Board and the Drug Supervisory Body formed the international drug administration, discussed the Bruce Committee's proposal to set up a Central Committee for Economic and Social Questions, doubt was expressed within the Opium Committee as to the expert knowledge of the members of the Central Committee which would have been necessary for directing the former body's work. League of Nations, Doc. C.162.M.147, 1940, XI, p. 15. The advantage of an agency coordinating and directing activi-

ties in the nonpolitical fields seemed not to be obvious so far as one of the more successful League agencies was concerned.

29. Already at the League of Nations Commission of the Peace Conference a Belgian amendment to the draft Covenant had been presented whose object was the creation of an International Commission on Intellectual Relations. This amendment ran as follows: "The associated States will ensure, to the widest possible extent, the development of international, moral, scientific and artistic relations among the divers peoples and will give evidence, by every means, of the formation of an international mentality. To this effect there is created an International Commission of Intellectual Relations." (French text: "Les Etats associés assureront, dans la plus large mesure possible, le développement des relations internationales, morales, scientifiques et artistiques entre les divers peuples et prouveront, par tous les moyens, la formation d'une mentalité internationale. Il est créé, à cet effet, une Commission internationale de relations intellectuelles.") At Paris no action was taken on this proposal. Miller, *op. cit.*, I, 350.

30. See the Assembly resolution of September 22, 1935, in League of Nations, *Records of the 6th Assembly, Plenary Meetings*, p. 105 (League of Nations, *Official Journal*, Special Supplement No. 33).

31. League of Nations, *Ten Years of World Co-operation*, p. 328.

32. Temperley, *op. cit.*, VI, 459.

33. *Ibid.*

14: THE MODERN THEORY OF UNIVERSAL LAW AND THE LEAGUE OF NATIONS; LEGAL MONISM AND THE PRIMACY OF THE LAW OF NATIONS

1. Hersh Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)*, p. 141, n. 2. Lauterpacht concludes his observation with the following words: "In our case, we ought not to accept absolute liability, because there is no superior to judge whether negligence (or *dolus*) has taken place; we ought to think in terms of a Court of International Justice deciding in each particular case whether a breach of international duty has been committed."

2. League of Nations, *The Aims, Methods and Activity of the League of Nations*, rev. ed., p. 26.

3. A comprehensive, critical analysis of the works of writers expounding this theory is to be found in Walter Schiffer, *Die Lehre vom Primat des Völkerrechts in der neueren Literatur*.

4. See especially *Précis de droit des gens: principes et systématique*

and "Règles générales du droit de la paix," Académie de Droit International, *Recueil des cours*, XLVI (1933-IV), 331ff. Scelle's legal theory is based on the doctrine of Léon Duguit, which in turn had its roots in nineteenth-century French social philosophy. Scelle obviously was also influenced by the "pure theory of law" of the Viennese school.

5. Scelle, *Précis de droit des gens*, II, 293. The French text reads: "l'existence de cette communauté œcuménique du Droit des gens qui reprend, en l'élargissant, l'ancienne construction juridique de la Chrétienté, sous la forme d'une *civitas maxima* universelle."

6. *Ibid.*, I, 11ff.; II, 1ff.

7. *Ibid.*, II, 4.

8. *Ibid.*, I, 34.

9. *Ibid.*, I, 51: "Il est aujourd'hui indiscutable que le fait juridique intersocial est mondial: que des relations sociales existent en puissance entre tous les habitants de la terre, et que les échanges de produits, de services et d'idées s'entrecroisent comme un réseau sur l'ensemble de la planète."

10. See above, p. 80.

11. Scelle, I, 31: "Toute norme intersociale prime toute norme interne en contradiction avec elle, la modifie, ou l'abroge ipso facto."

12. *Ibid.*, I, 39; II, 349ff.

13. Scelle consequently defined the "droit commun international" in the following manner: "It is the entirety of the norms that govern the international global community; that is, all the subjects of law that make it up, without acceptance of nationality, and which have the same hierarchic predominance over the states' juridical orders as the federal juridical order has over local juridical orders." ("C'est l'ensemble des normes que régissent la communauté internationale globale, c'est-à-dire tous les sujets de droit qui la composent, sans acception de nationalité et qui ont sur les ordres juridiques étatiques, la même prédominance hiérarchique que l'ordre juridique fédéral sur les ordres juridiques locaux.") *Ibid.*, II, 22.

14. *Ibid.*, I, 9ff.

15. *Ibid.*, Preface, p. vii: "Pour nous, les rapports qu'il va s'agir de décrire et d'analyser sont des rapports *entre individus*, formant une société universelle, et appartenant en même temps à d'autres . . . sociétés politiques . . . que la communauté humaine englobe et coordonne et que son droit régit."

16. *Ibid.*, I, 46: "Si l'on regarde les choses telles qu'elles sont, on s'aperçoit, en effet, que les *rapports internationaux de base*, ceux qui sont à l'origine des groupements intersociaux, sont des rapports particuliers ou *inter-individuels*. Ce sont les individus des différentes

collectivités qui contractent entre eux des liens de famille, se livrent à des actes de commerce, échangent des produits, cultivent des idées."

17. *Ibid.*, I, 42.

18. *Ibid.*, Preface, p. vii. Scelle declared that the term *droit des gens* was "as comprehensive as possible, provided the word *gens* was not taken exclusively in its Latin etymology, which still implies the notion of collectivity, but in its common and current meaning of *individuals*, considered singly as such and collectively as members of political societies." ("Il est en outre aussi compréhensif que possible, à condition de ne pas prendre exclusivement le mot 'gens' avec son étymologie latine qui implique encore l'idée de collectivité, mais dans son sens vulgaire et courant d'*individus*, considérés isolément comme tels et, collectivement, comme membres des sociétés politiques.")

19. *Ibid.*, I, 13ff.: "Il n'y a pas de place, dans un milieu juridique, pour une volonté souveraine."

20. *Ibid.*, II, 6: "Tout ordre juridique superposé, en effet, *conditionne* nécessairement les ordres juridiques sous-jacents. Les normes juridiques des collectivités composantes ne peuvent contredire les ordres juridiques supérieurs des sociétés composées sans que la solidarité globale qui est à l'origine de ces dernières en soit immédiatement affaiblie et menacée. *Il n'y a d'autre alternative pour un système juridique composé que régir ou disparaître.* C'est dire que les compétences des sujets de droit des systèmes composants sont immédiatement et *ipso facto* conditionnées par la règle de droit du système composé."

21. *Ibid.*, I, 76.

22. *Ibid.*, I, 78: "Or, si l'on abandonne la notion de souveraineté, il ne reste aucun critère juridique de la compétence étatique." See also p. 74: "il n'y a point de critère juridique de l'Etat."

23. *Ibid.*, I, 82.

24. In this theory the state appeared simply as one phase of the process by which individuals united in various groups of different size. *Ibid.*, I, 32: "A chacune de ces étapes, on verra se reproduire le même phénomène de hiérarchie juridique, le même conditionnement automatique des systèmes juridiques coordonnés par le système juridique coordonnateur, et ainsi de suite jusqu'à la dernière limite possible de la coordination, jusqu'à ce que le système normatif de la société humaine, ou Droit des gens, ait encadré et conditionné tous les autres systèmes normatifs de toutes les autres sociétés politiques nationales ou internationales."

25. *Ibid.*, I, 32ff.: "Le monisme juridique aboutit ainsi à supprimer toute opposition de nature entre le traditionnel droit interne et le traditionnel droit international, pour les fondre tous deux en un Droit intersocial unifié."

26. *Ibid.*, I, 48: "En réalité, la soi-distant conquête de la 'personnalité' par l'individu, en droit public international, c'est la conquête de la compétence pour agir contre les gouvernants, la conquête du droit d'action en justice pour faire respecter la légalité par les gouvernants." See also II, 32.

27. *Ibid.*, II, 44.

28. *Ibid.*, II, 103: "Il est inadmissible que la responsabilité individuelle disparaisse, dans ce domaine, derrière la responsabilité fictive et inopérante de l'Etat."

29. *Ibid.*, II, 7ff.

30. *Ibid.*, II, 11.

31. *Ibid.*: "On n'a jamais nié, il est impossible de nier, qu'il y ait une élaboration du droit positif, un contrôle juridictionnel des situations juridiques, une sanction exécutive allant jusqu'à l'emploi de la force —de la guerre,—dans les rapports interétatiques. Il y a donc législation, juridiction, gouvernement au sens large et au sens restreint ou matériel du mot, activité constitutionnelle complète, aussi bien dans les sociétés du Droit des gens que dans celles du droit interne. *Ce ne sont que les procédés de réalisation qui diffèrent.*"

32. *Ibid.*, I, 43; II, 10, 21.

33. *Ibid.*, II, 51. Scelle's opinion that the relations between individual nationals of different states were international relations determined his definition of the international functions performed by national authorities. "When the legislator of a state, or when national jurisdictions establish rules governing conflicts of laws or conflicts of jurisdiction, they enact *rules of international law*. . . . When a national judge delivers an opinion in a case between nationals and foreigners or between foreigners, he ceases to be a *national* judge and becomes an *international* judge." ("Lorsque le législateur étatique, ou les juridictions nationales, établissent des règles de conflits de lois ou de conflits de juridiction, ils édictent des *règles de droit international*. . . . Le juge national, lorsqu'il rend un jugement dans une affaire entre nationaux et étrangers ou entre étrangers, cesse d'être un juge *national* pour devenir un *juge international*.")

34. Scelle, "Règles générales du droit de la paix," p. 664.

35. Scelle, *Précis de droit des gens*, I, 125: "Tout gouvernement étant à la fois gouvernement national et gouvernement international, a pour compétence de maintenir et de faire respecter le Droit international en intervenant à cette fin."

36. *Ibid.*, II, 31: "Elle [i.e., intervention] peut, théoriquement, s'exercer non seulement au profit des nationaux, mais de tout sujet de droit dans l'ordre international, qu'il s'agisse de ressortissants d'Etats tiers, ou même de ceux de l'Etat contre lequel elle s'exerce."

37. Scelle, "Règles générales du droit de la paix," p. 669.

38. See Scelle's observations on the theory of "bellum justum," *ibid.*, pp. 675ff.

39. Scelle, *Précis de droit des gens*, I, 63ff.

40. Scelle emphasized "the unity of the law and the fundamental *parallelism* between the *juridical technique* of national disciplines and that of international law" ("l'unité du Droit et le *parallélisme* fondamental entre la *technique juridique* des disciplines nationales et celle du Droit international"). *Précis de droit des gens*, I, 69.

41. *Ibid.*, I, 83: "Sont 'Etats' les collectivités dont les gouvernants se sont vu reconnaître la compétence majeure du Droit des gens."

42. *Ibid.*, I, 74: "L'organisation étatique a toujours joué et joue encore, au sein de la communauté du Droit des gens, le rôle capital. Du point de vue politique elle est l'organisation de la puissance." In another passage (II, 5) Scelle declared that the states constituted the "hinge" between the national and international spheres. "L'Etat forme charnière, pourrait-on dire, entre le monde interne ou national et le monde externe ou international."

43. *Ibid.*, I, 23: "Le pouvoir est ainsi l'élément de base de toute organisation sociale."

44. *Ibid.*

45. *Ibid.*, I, 101: "le Droit international veut que lorsque les forces sociales se sont dégagées, imposées et organisées, la compétence soit reconnue à ceux qui les incarnent. C'est l'efficacité qui est le titre juridique de la compétence." A state existed "lorsque le *pouvoir de fait* des gouvernants d'une collectivité s'est définitivement affirmé et est devenu *exclusif* de tout autre." See also p. 102: "Le titre essentiel d'un gouvernement à gouverner, c'est la *puissance qu'il en a*."

46. *Ibid.*, I, 24.

47. On this question, see Schiffer, *op. cit.*, pp. 128ff.

48. Scelle, *Précis de droit des gens*, I, 55: "Nous observerons cependant un *rattachement* des individus sujets de droit et des situations juridiques aux territoires étatiques et, par là, à la compétence des agents et gouvernants nationaux."

49. *Ibid.* Scelle described that situation in the following way: "Les fonctions sociales internationales seront pour ainsi dire fractionnées, au lieu d'être coordonnées d'une façon assez analogue à ce qu'elles furent dans le système de la féodalité. Les communautés internationales particulières et la société internationale globale se trouvent comme réparties en autant de divisions administratives et judiciaires qu'il y a d'Etats intéressés. Mais ces divisions restent incoordonnées, sans autre liaison que la communauté du droit objectif qui s'appliquera dans chacune d'elles."

50. *Ibid.*, I, 117.

51. *Ibid.*, II, 139, 292, 547.

52. *Ibid.*, I, 23.

53. *Ibid.*, II, 547: "tant qu'une conscience plus claire de la solidarité commune n'aura pas transformé la procédure interétatique en procédure superétatique, et substitué la hiérarchie des compétences à leur utilisation concurrente."

54. *Ibid.*, I, 57: "Ce n'est pourtant que d'une organisation superétatique que l'on peut raisonnablement attendre l'épanouissement définitif et l'efficacité du Droit." In another passage (I, 188) Scelle declared that the steady growth of solidarity required "l'existence d'une hiérarchie juridique et institutionnelle, exclusive de l'idée de souveraineté, et dont l'aboutissement idéal serait le fédéralisme universel."

55. *Ibid.*, II, 28. See also II, 254ff.

56. *Ibid.*, II, 548ff.

57. *Ibid.*, I, 213: "C'est . . . le pôle vers lequel s'oriente, sans probablement jamais devoir y parvenir, la communauté du Droit des gens."

58. *Ibid.*, II, 15: "La théorie des libertés individuelles et collectives est à la base même du Droit des gens. Elle se confond presque avec lui pour les tenants du droit naturel ou de l'idéalisme juridique."

59. *Ibid.*, II, 14.

60. *Ibid.*, II, 24.

61. *Ibid.*, II, 17.

62. *Ibid.*, II, 18ff.

63. *Ibid.*, II, 262.

64. Scelle, "Règles générales du droit de la paix," p. 410.

65. Scelle, *Précis de droit des gens*, II, 294: "la transposition en Droit des gens du principe démocratique de l'attribution et du retrait, par les gouvernés, des compétences gouvernementales." See also II, 259ff.: "la formule du droit des peuples est l'aboutissement, en droit public international, du principe démocratique du droit interne relatif à l'institution, au contrôle et à la destitution des gouvernants."

66. *Ibid.*, I, 188: "le besoin de self-government, qui est une condition du progrès, du libre développement des génies ou particularités ethniques."

67. Scelle considered a "universal military order" neither probable nor desirable. *Ibid.*, II, 86.

68. *Ibid.*, I, 187ff.

69. *Ibid.*, I, 13.

70. *Ibid.*, II, 260. That principle "fait passer la 'compétence des compétences' des gouvernants aux gouvernés,—ce qui est bien la négation de la souveraineté des premiers."

71. "Règles générales du droit de la paix," p. 411: "c'est dans une diminution de la compétence discrétionnaire (ou, si l'on préfère, de

l'ancienne notion de souveraineté), que résident les possibilités de libération des peuples."

72. *Précis de droit des gens*, I, 14.

73. "Règles générales du droit de la paix," pp. 372ff.

74. *Ibid.*, p. 373: "vouloir maintenir la notion de souveraineté étatique, c'est nier l'existence du droit international."

75. *Précis de droit des gens*, I, 25.

76. *Ibid.*, I, 57.

77. Scelle himself admitted the decisive role played by the states or their rulers within the League. See, for instance, *ibid.*, I, 258.

78. *Ibid.*, I, 69.

79. *Ibid.*, I, 47.

80. See *ibid.*, II, 11, where Scelle declared that the present imperfection of the supranational organization did not justify the conclusion "that the efficacy of the law known as 'international' will not some day be the same as that of the law known as 'municipal' " ("que l'efficacité du droit dit 'international' ne sera pas quelque jour la même que celle du droit dit 'interne' ").

81. *Ibid.*, II, 64ff.

82. *Ibid.*, II, 70: "C'est un régime d'anarchie qui, dans les périodes de crise, aboutit à la course aux armements tarifaires, au protectionisme aveugle, au nationalisme économique, dont le résultat le plus clair est d'acculer progressivement les peuples au chômage et aux catastrophes économiques, commerciales et monétaires."

83. *Ibid.*: "un organisme superétatique propre à dégager l'intérêt général et la solidarité internationale."

SOME CONCLUSIONS: UNITED NATIONS AND WORLD STATE

1. Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations; Commentary and Documents*, p. 55.

2. United Nations Charter, Article 2.

3. *Ibid.*, Article 55.

4. *Ibid.*, Article 1 (4).

5. See above, p. 209.

6. See Felix Morley, *Humanity Tries Again; an Analysis of the United Nations Charter*, pp. 21ff.

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